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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

ERICH H. ADAMS, et al.,

Petitioners,

v.

DELTA AIR LINES, INC. and
AIR LINE PILOTS ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can an employment discrimination plaintiff suffer a summary judgment for allegedly failing to raise an inference that unlawful discrimination was at least a "motivating factor" in the adverse employment action at issue, where the district court specifically finds plaintiff's direct evidence of discriminatory animus on the part of a primary decision-maker to be credible?

LIST OF INTERESTED PARTIES

Petitioners:

Erich H. Adams; John Araiza; Paul Barker; Michael B. Barry; Barry A. Bashore; Ross F. Bonny, Jr.; Gary L. Boyd; Lane D. Browne; Marshall J. Burnette; Richard P. Cahill; Ronald Cather; Gary H. Chapman; Leo D. Coffield; Thomas P. Conroy; Jimmy R. Cornett; James C. Dawson; Monte Downum; Joseph Dubois; Richard A. Featherstone; Charles Fentner; Robert G. Foster; Peter G. Ganotis; Andrew L. Gattone; Murphy T. Gill; Henry Guttman; Thomas R. Henry; Thomas Henry; Joiy Holder; James R. Hurson; Donald W. Jenkins; Olav Jonassen; Paul S. King; Henry J. Knoch; Tracy Qualls; Kenneth D. Lambert; John A. Langford; Maurice T. Legare; Norman W. Letendre; Lawrence M. Lund; Raymond J. Lund; Ralph A. Manley; James R. Martinez; Richard A. Mau; Terry L. McCarthy; Gerarde Meschino; Mike E. Millard; Stephen A. Mills; James C. Montgomery; Francis Dale Morgan; James M. Morris; Richard J. Naert; Frank Nyilas; George D. Pappas; John R. Pottinger; Mark Powell; William J. Powers; Thomas E. Ruland; Ronald K. Rupp; Jim Schultz; Patrick Sheil; David A. Stephens; John F. Taylor; Robert Thrasher; Charles F. Vaughn; Louis Villafane; Diana R. Wiggins, as Personal Representative of the Estate of Robert H. Wiggins; Ken A. Williamson; George E. Wilson; Larry W. Wilson; Hal J. Zamora; Richard C. Ziko; Mary Beth Lambert, as Executrix of the Will of Thomas D. Lambert

Respondents:

Delta Air Lines, Inc. and Air Line Pilots Association

RESPONDENTS' PRIOR CORPORATE DISCLOSURE STATEMENT

In their Answer Brief to the Second Circuit Court of Appeals, Respondents filed the following corporate disclosure statement:

Pursuant to Fed R. App. P. 26.1, defendant-appellee Delta Air Lines, Inc. states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public, except to the extent that Delta's membership on the Boards and/or corporate ownership of from 15% to 35% of shares results in the following publicly traded companies being considered affiliates under Fed. R. App. P. 26.1:

Atlantic Southeast Airlines, Inc.

Comair Holdings, Inc.

SkyWest, Inc.

Empresa de Transporte Aéreo del Perú, S.A., Aeroperú

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CITATIONS OF PRIOR COURT OPINIONS IN THIS CASE

Second Circuit Opinions:

Adams v. Delta, 175 F.3d 1007 (2nd Cir. 1999) (unpublished opinion). (App. 1-5).

District Court (S.D. N.Y.) Opinions:

Adams v. Delta, 1997 WL 620823 (S.D. N.Y. October 8, 1997). (App. 6-21).

Adams v. Delta, 1997 WL 805078 (S.D. N.Y. December 31, 1997). (App. 22-24).

JURISDICTIONAL STATEMENT

Petitioners respectfully submit that certiorari jurisdiction is proper in this case under Rule 10(a), Rules of the Supreme Court of the United States, as the decision in this case by the United States Court of Appeals for the Second Circuit directly conflicts with the decisions of several other United States Courts of Appeals – specifically the Sixth, Third, Seventh and Eleventh Circuits – on the same important matter.

The order sought to be reviewed was entered by the Second Circuit on February 19, 1999.

On April 28, 1999, the Second Circuit denied rehearing of its February 19, 1999 order. (App. 25-26).[1]

[1] As evidenced by the court's order of April 28, 1999, the Second Circuit treats suggestions for rehearing en banc as

STATEMENT OF MATERIAL FACTS

In this case, federal jurisdiction was based on petitioners/plaintiffs' claim that Delta Air Lines, Inc. ("Delta") violated the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*

For the Court's benefit, the following is a *brief* recitation of the nature of the controversy, and the evidence considered by the district court and the Second Circuit panel in reaching their respective decisions.

A. DELTA PURCHASES PAN AM, AND THE PAN AM FLIGHT ENGINEERS ARE INTEGRATED INTO THE DELTA WORKFORCE

This petition is filed on behalf of the plaintiffs in the proceedings below, Erich H. Adams and 70 other flight engineers formerly employed by Pan Am World Airways, Inc. and Pan Am Shuttle, Inc. (collectively "Pan Am"), who were hired by Delta as part of Delta's purchase of Pan Am's Shuttle and TransAtlantic routes in 1991. Pan Am and Delta entered into an Asset Purchase Agreement ("APA"), dated July 27, 1991, to effectuate the transaction. The closing date was November 1, 1997.

The APA between Delta and Pan Am provided that Delta's pilot union ("ALPA") had to approve any seniority integration plan for the Pan Am cockpit personnel because Delta's Collective Bargaining Agreement ("CBA") with the union otherwise required all newly hired cockpit personnel to be placed on the bottom of

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petitions for rehearing. *See* Rule 13(3), Rules of the Supreme Court of the United States.

Delta's seniority list. (App. 7). The APA also contained a provision that required Delta to give Pan Am cockpit personnel written notice, no later than August 15, 1991, of the terms and conditions upon which offers of employment would be made. (App. 29). However, this same provision recognized that Delta might not be able to finalize all of the details of the seniority integration until after the transferred pilots had been identified; in that event, Delta was required to provide a description of its objectives and intentions with respect to seniority integration, along with a description of the seniority integration methodologies that Delta was likely to use. (App. 29).

The integration of Pan Am captains, first officers, and flight engineers into the Delta seniority list was the subject of Section 20 of the Supplemental Collective Bargaining Agreement ("Supplemental CBA") between Delta and Delta ALPA. As noted previously, Delta was required to give Pan Am pilots written notice of the terms and conditions upon which offers of employment would be made to Pan Am employees, including Delta's intentions with respect to the seniority integration methodologies that Delta might use.

As of August 26, 1991, Section 20(f)(2) of the Supplemental CBA read in part as follows:

> November 1, 1991, or the date of the Closing, whichever occurs last, shall be known as the Integration Date. Effective upon the Integration Date all Acquired Pilots, employed by the Company as of the date, shall be integrated into the Delta Pilot's System Seniority List, subject to the following methodology:

* * *

> **b. Each member of the class of Acquired Pilots employed by the Company as First Officer or Second Officer [flight engineer] shall be ranked relative to all other members of that class, in seniority order as defined by Pan American World Airways, Inc. and as conveyed to the Company.** All members of the class defined in this sub-section shall be integrated into the Delta Pilot's System Seniority list in the seniority sequence defined in this sub-section, with the most senior of the class being assigned the four thousand, two hundred and thirty-eighth (4238th) position on the list. . . . (App. 8).[2]

The August 26, 1991 version of Section 20(f) also included a subsection (3), which provided:

> **If for any reason, Pan American World Airways, Inc. does not convey to the Company [Delta], the seniority rank order of the Acquired Pilots by the Integration Date, the date of birth of each Acquired Pilot shall serve to establish the seniority order of the Acquired Pilot for the purpose of paragraph 20.F.1 of this Agreement,** and to establish seniority order within the respective classes as defined in paragraphs 20.F.2a. & b. of this Agreement, with the higher seniority attributed to the earliest date of birth. (App. 8).

The Supplemental CBA was reviewed and revised by Delta management at least four times between August 19,

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[2] All emphasis has been supplied by counsel unless otherwise noted.

1991 and August 29, 1991. Throughout the various revisions, Sections 20(F)(2)(b) and 20(F)(3), as set forth above, remained intact.

The final version of the Supplemental CBA, signed on August 30, 1991, radically altered the version of Section 20(F) which had been furnished to Pan Am cockpit personnel on August 26, 1991.[3] Section 20(F)(3), which previously provided for integration based on date of birth in the event Pan Am did not provide a list with the relative seniority rank of first officers and flight engineers, was deleted entirely and the remaining subsections were renumbered. (App. 8-9).[4] On August 27, 1991, Captain Harry C. Alger, Delta's then Vice-President of Flight Operations, had a telephone conversation with Richard Burke at Pan Am regarding the integration. According to Mr. Burke's correspondence memorializing the conversation, Captain Alger and Mr. Burke spoke about the integration methodology three days before the final version of the Supplemental CBA surfaced containing the previously unseen changes to Section 20(F). (App. 40). Of course, the method which Captain Alger described was identical to the one eventually contained in the final

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[3] It is uncontested that the final version of the Supplemental CBA was not provided to Pan Am cockpit personnel prior to its execution by Delta and Delta ALPA, in contravention of the APA. (App. 9).

[4] However, Delta knew as early as the spring of 1991 that Pan Am had two seniority lists, thus making it difficult to devise a single list. (App. 32). Delta was also aware of the possibility that Pan Am could not provide one seniority list, and it appears that this date of birth default provision was expressly included for such a contingency. (App. 39).

version of Section 20(F). Thus, Captain Alger – who had the authority to make such last minute changes and who, prior to August 27, 1991, was not involved in the Section 20(F) revision process – had planned to and did unilaterally change Section 20(F). (App. 8-10, 14-15).

This change severely damaged Pan Am's former flight engineers, including the petitioners in this case. For example, as a result of Delta's integration methodology, 66 of the 71 petitioners were furloughed by Delta in 1993. In contrast, had a date of birth integration methodology (the default methodology) been used, only 7 of the 71 petitioners would have been furloughed. (App. 43-44). In addition, the handful of the petitioners who escaped furlough were nonetheless unable to hold their positions once Delta second officers (flight engineers) – with better seniority rankings – were permitted to bid for their seats in the cockpit. (App. 43-44). Lastly, under the integration methodology instituted by Delta, the most senior flight engineer acquired by Delta ended up being junior to more than 95% of the cockpit personnel on the Delta seniority list, and 43 of the 71 petitioners ended up with seniority rankings in the bottom one percentile of the Delta list. (App. 43).

B. PETITIONERS PRODUCED UNDENIABLE DIRECT EVIDENCE THAT A PRIMARY DECISION-MAKER AT DELTA REGARDING THE INTEGRATION HARBORED IMPROPER AGE-BASED BIAS

Before both the district court and the Second Circuit panel, petitioners provided the following quantum of

evidence that one of, if not **the** primary decision-maker at Delta regarding the integration method challenged by petitioners as violative of the ADEA, harbored discriminatory age-based animus. As detailed below, Captain Alger, Delta's then Vice-President of Flight Operations, was heavily involved in Delta's pre-purchase evaluation meetings with Pan Am (as the district court so found). It is important to note that Captain Alger's involvement in the integration process substantially pre-dated the last-minute alteration of Section 20 of the Supplemental CBA (discussed above).

In furtherance of the Delta purchase of Pan Am, Captain Alger met and took notes of his meetings with his counterpart at Pan Am, Captain Daniel Affourtit. (App. 10-11, 52). Captain Alger's notes contain a litany of damning comments regarding the age of Pan Am's flight engineers and their seniority. For instance, Captain Alger noted: "**> [greater than] 60 inc[ludes] 72 year old S[econd] O[fficer] and two step down bid former Capt[ains].**" (App. 53).[5] Since Federal Aviation Administration ("FAA") regulations prohibit a pilot from flying a commercial aircraft past the age of 60,[6] Captain Alger self-evidently was referring solely to the Pan Am flight engineers.

Captain Alger also noted that "**< [less than] ½ will retire in next five years as most hiring done in '64, '65, '66.**" (App. 53-54). In the "Conclusion Summary" section

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[5] A pilot cannot occupy the captain or first officer seats after he or she turns age 60. *See infra* note 6. There is no such prohibition for flight engineers (like petitioners herein).

[6] 14 C.F.R. § 121.383(c).

of his notes on his meeting with Captain Affourtit, Captain Alger wrote: "**Too much long term potential prob[lem] here after the ~~original~~ bad apples have long since retired.**" (App. 54-55).[7] Other notes from Captain Alger disclose his age-based animus. One such note states: "**Personnel: Contaminated Workforce esp[ecially] since '87. Not meet Delta standards.**" (App. 57-59, 64). Directly below these words, Captain Alger again paid his respects to Pan Am's flight engineers: "**68 > [greater than] age 60, 4 > [greater than] age 70, 26 double bid down, 50% retire 2001 not 1995.**" (App. 64). An additional note penned by Alger says: "**Dirty deal. Last 20 years drawing garbage.**" (App. 57, 65).[8]

Captain Alger also authored a document titled "PAA [Pan Am Airlines] Asset Acquisition Summary." He wrote under the "Negative" column in the summary: "**Labor force contaminated esp[ecially] since '87.**" Next to that statement are Captain Alger's remarks: "**68 [greater than] age 60, 4 [greater than] age 70, 50% retire in 2001 not 5 years.**" Moreover, Captain Alger noted under the "Labor

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[7] Captain Alger claims that "bad apples" was Captain Affourtit's term, not his. (App. 55). Captain Affourtit, however, flatly contradicted Captain Alger on this point, testifying on deposition that he did not use the term "bad apples" to describe Pan Am cockpit personnel nor did he relate any negative information to Captain Alger regarding their age. Indeed, Captain Affourtit considered his people to be extraordinarily capable and well qualified. (App. 35-37).

[8] Once again, Captain Alger claims that Captain Affourtit made the "dirty deal" reference. (App. 57). And once again, Captain Alger's testimony is refuted by that of Captain Affourtit. (App. 37-38).

Force" category in the summary: "**Pay off professional Fl[ight] E[ngineers].**" (App. 59-63).[9]

On May 2, 1991, Captain Alger reported the results of his fact finding mission to Rex McClelland, Delta's Senior Vice-President for Operations. Mr. McClelland's notes of a telephone conversation with Captain Alger state: "**Pan Am is burdened with a two-step bid down system and has several 'aged' flight engineers, some in their 70's and one in particular, age 72 plus (born 1919).**" (App. 67). Mr. McClelland also writes "**HCA [Harry C. Alger] confirms approximately one-half of seniority list pilots due to retire within five years.**" (App. 68).

William Spalding, Delta's Manager Contract Administration, was responsible for contacting qualified Pan Am personnel and arranging interviews with Delta. Mr. Spalding's notes of a telephone conversation with Captain Alger state: "**Nylias 727 S[econd] O[fficer]-HCA [Harry C. Alger] no hire.**" Frank Nylias was one of the oldest flight engineers at Pan Am and was the only flight engineer hired[10] by Delta who was over the age of 70. (App. 70-72).

Finally, according to Captain Alger, an aircraft cannot be operated at the "highest levels of safety" if someone

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[9] Pan Am's Captain Affourtit testified on deposition that he could not imagine using the word "contaminated" with regard to pilots, and he never suggested to Captain Alger that professional flight engineers should be paid off. (App. 37-38).

[10] Delta apparently did not follow through on Captain Alger's directive not to hire Mr. Nylias on the advice of its legal department. (App. 74-77).

over 60 years old is in the cockpit. (App. 46-51); a view he likewise expressed on deposition in another age discrimination case when explaining the basis for Delta's long-standing policy banning pilots over age 60 from the cockpit:

> . . . **knowing what we know about the aging process, any crew member, in this case, a second officer, to fly beyond 60, degradation that goes with it happens, performance is going to decline with age.** (App. 79-80).[11]

C. THE DISTRICT COURT GRANTED DELTA SUMMARY JUDGMENT NOTWITHSTANDING PETITIONERS' DIRECT EVIDENCE OF AGE-BASED DISCRIMINATORY ANIMUS

Presented with the above direct evidence, the district court concluded that petitioners had adequately demonstrated that Alger was the primary decision-maker in this case, and that he was motivated by age bias, *i.e.*, that petitioners' direct evidence was credible: "Such comments [by Alger] certainly reflect a bias toward older pilots, and the deposition testimony in particular evinces a bias based on the sort of age-based stereotypes that the ADEA was meant to combat." (App. 14).[12] The district

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[11] Delta has a checkered history on age-related issues, as evidenced in the Ninth Circuit's opinion in *Baker v. Delta Air Lines, Inc.*, 6 F.2d 632 (9th Cir. 1993), a case which, perhaps not coincidentally, prominently features Alger and his age-based views on cockpit personnel.

[12] The district court also recognized that with respect to Alger's discriminatory animus, the present case is factually distinguishable from *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102

court nonetheless ruled that petitioners did not "establish any adverse age-related effect" resulting from the integration methodology employed by Delta, and entered summary judgment in favor of Delta on petitioners' age discrimination claims. (App. 19-20).[13]

As discussed hereafter, the Second Circuit panel disregarded or completely discounted the explicit findings by the district court that petitioners' direct evidence was credible, and held that petitioners' proof that Alger harbored substantial age bias (with all inferences drawn in petitioners' favor) was insufficient to raise a reasonable inference of discriminatory motive.

D. THE SECOND CIRCUIT PANEL AFFIRMED THE SUMMARY JUDGMENT NOTWITHSTANDING PETITIONERS' DIRECT EVIDENCE OF AGE-BASED DISCRIMINATORY ANIMUS

In an opinion filed on February 19, 1999, a panel of the Second Circuit affirmed the district court's grant of summary judgment on each of petitioners' claims. In affirming the district court's summary dismissal of the federal ADEA claim[14], the Second Circuit, with little illustration or explanation, stated:

(2d Cir. 1997), where age-biased statements by Alger were held to be unconnected to the plaintiffs therein.

[13] The district court's ruling that no adverse effect could be proven is contrary to the evidence proffered by petitioners regarding the severe damages they suffered as a result of the altered integration method, *e.g.*, furloughs and loss of bidding rights. *See supra*.

[14] For the purpose of the present petition, petitioners only seek consideration of the Second Circuit's affirmance of the summary judgment on their federal ADEA claim.

> Because we agree with the district court that plaintiffs failed to offer proof from which a reasonable fact finder could infer that defendant had a discriminatory motive in implementing its integration methodology, *see McLee v. Chrysler Corp.*, 109 F.3d 130, 135 (2d Cir. 1997), we affirm the grant of summary judgment on the federal claim.

(App. 4).[15]

Thus, despite the overwhelming evidence presented to, and deemed credible by, the district court regarding Captain Alger's repeated derogatory statements about older cockpit personnel, the Second Circuit nonetheless ruled that petitioners' direct evidence of discriminatory animus on the part of a primary decision-maker at Delta was insufficient to raise an inference of discriminatory motive, and summary judgment was therefore proper. This ruling is in direct conflict with the decisions of several United States Circuit Courts of Appeals.

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[15] Notably, the district court **did not** rule that petitioners failed to demonstrate an inference of discriminatory motive. *See supra*. Thus, the Second Circuit's opinion cannot be squared with that of the district court.

ARGUMENT

I. SEVERAL UNITED STATES COURTS OF APPEALS HAVE HELD THAT A PLAINTIFF WHO PRODUCES DIRECT EVIDENCE OF DISCRIMINATORY ANIMUS BY A DECISION-MAKER HAS NECESSARILY MET HIS OR HER BURDEN TO RAISE AN INFERENCE THAT DISCRIMINATION WAS AT LEAST A "MOTIVATING FACTOR" IN THE ADVERSE EMPLOYMENT ACTION

A. The Sixth Circuit Court of Appeals

In *Terbovitz v. Fiscal Court of Adair County Kentucky*, 825 F.2d 111 (6th Cir 1987), the Sixth Circuit explicitly ruled that an employment discrimination plaintiff necessarily proves that unlawful discrimination was a motivating factor in the employment decision at issue when the district court finds plaintiffs' direct evidence credible.

> Direct evidence of discrimination, if credited by the fact finder, removes the case from *McDonnell Douglas* because the plaintiff no longer needs the inference of discrimination that arises from the prima facie case. Upon crediting the plaintiff's direct evidence, the district court finds facts **requiring the conclusion that unlawful discrimination was at least a "motivating factor"** for the employer's actions.

Id. at 115 (footnote omitted).

B. The Third Circuit Court of Appeals

The Third Circuit is likewise in accord that direct evidence necessarily raises an inference that unlawful

discrimination was a motivating factor in the employment decision at issue. *Starceski v. Westinghouse Electric Corp.*, 54 F.3d 1089 (3rd Cir. 1995).

> We believe, on the other hand, that the distinction between a *Price Waterhouse* and *McDonnell Douglas/Burdine* case lies in the kind of proof the employee produces on the issue of bias. In the former, **direct evidence of discriminatory animus leads not only to a ready logical inference of bias, but also to a rational presumption that the person expressing bias acted on it.** As Chief Justice Vinson put it in *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 892-93, 97 L.Ed. 1244 (1953), he who has a mind to discriminate is likely to do so.

Id. at 1097.

C. The Seventh Circuit Court of Appeals

The Seventh Circuit has also held that direct evidence of discriminatory animus on the part of a decision-maker creates (at least) an inference that unlawful discrimination was a motivating factor in the adverse employment action. *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997).

> Still, remarks and other evidence that reflect a propensity by the decisionmaker to evaluate employees on illegal criteria will suffice as direct evidence of discrimination even if the evidence stops short of a virtual admission of illegality. **Proof of this nature supports the inference that a statutorily proscribed factor – race, sex, age, or in this case, religion – was at**

> **least a motivating factor** in the adverse employment action at issue.

Id. at 973.

In *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563 (7th Cir. 1989), the Seventh Circuit was even more definitive, holding that credible direct evidence is actual proof of discrimination (which must be countered by the defendant via *Price Waterhouse*), not just an inferential showing that an employer was motivated by bias.

> The [district] court noted that **by definition, direct evidence, if believed by the trier of fact, will prove the fact in question without reliance upon inference or presumption**. Therefore, the district court held that to render the indirect method of proof of *McDonnell Douglas* is [sic] inapplicable, a plaintiff's so-called "direct" evidence must not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question. We believe that these two requirements are consonant with the Supreme Court's decision in [*Price Waterhouse v.*] *Hopkins*.

Id. at 569.

D. The Eleventh Circuit Court of Appeals

Finally, the Eleventh Circuit shares the view of the Seventh Circuit that direct evidence, if found credible by the district court, is proof of a unlawful motive – not merely an inference thereof. *Burns v. Gadsden State Community College*, 908 F.2d 1512 (11th Cir. 1990).

> A prima facie case of discrimination may also be proven by direct evidence of age or sex discrimination. **Such evidence, if believed, proves the existence of a fact in issue without inference or presumption.**

Id. at 1518 (citations omitted).

As the above decisions demonstrate, in the Sixth, Third, Seventh and Eleventh Circuits, a plaintiff who produces direct evidence of discriminatory bias which is deemed credible by the district court has necessarily shown that unlawful discrimination was at least a motivating factor in the adverse employment action complained of; *ergo* cannot suffer summary judgment.

The panel's decision in the present case evinces that the rule is not the same in the Second Circuit. There can be no dispute that the district court found petitioners' direct evidence regarding Alger's age bias credible, as it specifically stated as much. (App. 14-16). There can likewise be no dispute that the district court found Alger to be a primary decision-maker in the integration process which is the adverse employment action challenged by petitioners here. (App. 9, 15). Despite these findings, however, the Second Circuit panel ruled that "plaintiffs failed to offer proof from which a reasonable fact finder could infer that defendant had a discriminatory motive in implementing its integration methodology[.]" This ruling cannot be squared with the above decisions, which hold that such inference **necessarily** follows the kinds of proof the district court credited in this case. Accordingly, the Second Circuit's decision in this case conflicts with those of other United States Courts of Appeals, and certiorari

jurisdiction is appropriate. Rule 10(a), Rules of the Supreme Court of the United States.

CONCLUSION

In this case, petitioners produced direct evidence of an unlawful discriminatory attitude on the part of the primary figure responsible for the adverse employment action at issue, and the district court specifically found that direct evidence believable. Nonetheless, the Second Circuit (as the district court had) ruled that petitioners could not present their case of illegal discrimination to a jury as a matter of law. Petitioners respectfully submit that if credible direct evidence of unlawful bias is legally insufficient to survive summary judgment, as the Second Circuit appears to hold, no employment discrimination plaintiff will ever be able to sufficiently prove his or her complaint, and the civil rights laws enacted for the protection of workers in this country will be effectively

nullified. Therefore, the need for certiorari review in this case cannot be overstated.

Respectfully submitted,

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**Counsel of Record*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

(Filed Feb. 19, 1999)

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 19th day of February, one thousand nine hundred and ninety-nine.

PRESENT: HON. JAMES L. OAKES,
HON. DENNIS JACOBS,
HON. ROSEMARY S. POOLER,
Circuit Judges.

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ERICH H. ADAMS, JOHN ARAIZA, PAUL BARKER, MICHAEL B. BARRY, BARRY A. BASHORE, ROSS F. BONNY, JR., GARY L. BOYD, LANE D. BROWNE, MARSHALL J. BURNETTE, RICHARD P. CAHILL, RONALD CATHER, GARY H. CHAPMAN, LEO D. COFFIELD, THOMAS P. CONROY, JIMMY R. CORNETT, JAMES C. DAWSON, MONTY DOWNUM, JOSEPH DUBOIS, RICHARD A. FEATHERSTONE, CHARLES FENTNER, ROBERT G. FOSTER, PETER G. GANOTIS, ANDREW L

GATTONE, MURPHY T. GILL, HENRY GUTTMAN, THOMAS R. HENRY, JOIY HOLDER, DONALD W. JENKINS, OLVA JONASSEN, PAUL S. KING, HENRY J. KNOCH, KENNETH D. LAMBERT, JOHN A. LANGFORD, MAURICE T. LEGARE, NORMAN W. LETENDRE, LAWRENCE M. LUND, RAYMOND J. LUND, RALPH A. MANLEY, JAMES R. MARTINEZ, RICHARD A. MAU, TERRY L. MCCARTHY, GERARDE MESCHINO, MIKE E. MILLARD, STEPHEN A. MILLS, JAMES C. MONTGOMERY, FRANCIS DALE MORGAN, JAMES M. MORRIS, RICHARD J. NAERT, FRANK NYILAS, GEORGE D. PAPPAS, JOHN R. POTTINGER, MARK POWELL, WILLIAM J. POWERS, RONALD K. RUPP, JIM SCHULTZ, PATRICK SHEIL, DAVID A. STEPHENS, JOHN F. TAYLOR, ROBERT THRASHER, CHARLES F. VAUGHN, LOUIS VILLAFANE, KEN A. WILLIAMSON, GEORGE E. WILSON, HAL J. ZAMORA, LARRY W. WILSON, RICHARD C. ZIKO, JAMES R. HURSON, TRACY QUALLS, THOMAS E. RULAND, DIANA R. WIGGINS, as Personal Representative of the Estate of Robert H. Wiggins, deceased, and MARY BETH LAMBERT, as Executrix of the Will of Thomas D. Lambert,

Plaintiffs-Appellants,

-v.- 98-7120

DELTA AIR LINES, INC. and AIR LINE PILOTS ASSOCIATION,

Defendants-Appellees.

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APPEARING FOR APPELLANT: RALPH O. ANDERSON, Miami, FL (Hicks & Anderson, P.A., Anderson Moss Sherouse & Petros, P.A., Miami, FL; Allen Norton & Blue, Coral Gables, FL, on the brief)

APPEARING FOR APPELLEE: WILLIAM H. BOICE, Atlanta, GA (Stephen E. Hudson, Kilpatrick Stockton LLP; Thomas C. French, Delta Air Lines Law Department, on the brief).

Appeal from the grant of summary judgment in the United States District Court for the Southern District of New York (Baer, *J.*) on federal, state, and city age discrimination claims brought by airline flight engineers.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of the district court is **AFFIRMED.**

Plaintiffs are 71 flight engineers formerly employed by Pan Am World Airways, Inc. who were hired by Delta Air Lines, Inc. as part of Delta's purchase of certain Pan Am assets. At the time the disputed integration methodology was implemented, plaintiffs ranged in age from ~~29~~ to 71. They allege that the manner in which they were integrated into Delta's seniority list discriminated against them in violation of (i) the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34, (ii) New York State Human Rights Law, N.Y. Exec. Law § 296 (McKinney 1993), and (iii) the New York City Human Rights Ordinance, N.Y. City Admin. Code §§ 8-107(1)(a) and (c), and 8-107(17).

Defendants moved for summary judgment on the federal claim, and to dismiss for lack of subject matter jurisdiction on the state and city claims because of preemption. The United States District Court for the Southern District of New York (Baer, *J.*), granted summary judgment in favor of defendant-appellants on the federal

age discrimination claim. *See Adams v. Delta Air Lines, Inc.*, No. 96-2871, 1997 WL 620823, at *1 and n.2 (S.D.N.Y. Oct. 8, 1997). As to the state and city law claims, the district court (i) granted summary judgment, and (ii) ruled alternatively that "[t]o the extent the analysis of the summary judgment motion differs under the state and city laws," the state and city claims were dismissed on the ground that they were preempted by the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1). *Adams*, 1997 WL 620823, at *1 n.2 (citing *Abdu-Brisson v. Delta Air Lines, Inc.*, 927 F. Supp. 109 (S.D.N.Y. 1996), *rev'd*, 128 F.3d 77 (2d Cir. 1997)). This appeal followed.

Because we agree with the district court that plaintiffs failed to offer proof from which a reasonable fact finder could infer that defendant had a discriminatory motive in implementing its integration methodology, *see McLee v. Chrysler Corp.*, 109 F.3d 130, 135 (2d Cir. 1997), we affirm the grant of summary judgment on the federal claim.

As to the state and city claims, plaintiffs argue on appeal that the district court's preemption analysis was erroneously predicated on a precedent that was subsequently overruled. *See Abdu-Brisson*, 927 F. Supp. at 112, *rev'd*, 128 F.3d at 83-85. The district court relied on *Abdu-Brisson*, however, only insofar as the substantive grounds for dismissal of the federal claim did not dispose of the state and city claims as well. We can affirm if the grant of summary judgment was valid – *i.e.*, if the dismissal of the federal claim justified dismissal of the state and city claims.

The elements of federal and state age discrimination claims are the same. *See Spence v. Maryland Cas. Co.*, 995

F.2d 1147, 1158 (2d Cir. 1993); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1180 (2d Cir. 1992). "This makes sense, because the ultimate goals of the fact-finders in both federal and New York age discrimination actions are the same – to determine whether an adverse employment decision was made 'because of' age." *Tyler*, 958 F.2d at 1180. Consequently, the dismissal of plaintiffs' federal age discrimination claim justifies, without further analysis, the dismissal of their state law age discrimination claim. *See Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 467 (2d Cir. 1997) ("Hence, a district court may dismiss claims brought under the New York State Human Rights Law, on the ground that the plaintiff failed to establish a claim under the ADEA."); *see also Spence*, 995 F.2d at 1158 ("[Plaintiff's] age discrimination claim under state law is governed by the same standards as his ADEA claim and was therefore properly dismissed." (citations omitted)).

Although plaintiffs argue that a more liberal standard governs their city ordinance claim, they neither describe that standard nor explain why it would result in a different outcome.

Therefore, we also affirm the dismissal of their city ordinance claim.

The district court's grant of summary judgment on all plaintiffs' claims is affirmed.

FOR THE COURT:
CAROLYN CLARK CAMPBELL, CLERK
By:

/s/ Lucille Carr
Lucille Carr, Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC H. ADAMS, et al., Plaintiffs, -against- DELTA AIR LINES, INC. and the AIR LINE PILOTS ASSOCIATION, Defendants.	96 Civ. 2871 (HB) **OPINION AND ORDER**

HAROLD BAER, JR., District Judge:

Defendant Delta Airlines ("Delta")[1] moves for summary judgment dismissing plaintiffs' age discrimination claims. For the reasons discussed below, the motion is **GRANTED** and the complaint is **DISMISSED.**[2]

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[1] Defendant Air Line Pilot Association, joined as a necessary party, *see* Fed. R. Civ. P. 19, has not moved for summary judgment, but the complaint against it is dismissed as well.

[2] Defendant also separately moved to dismiss plaintiffs' state law claims for lack of jurisdiction, arguing such claims are preempted by the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1) and other statutes. In light of the resolution of the summary judgment motion in defendant's favor, the Court need not reach the motion to dismiss. To the extent the analysis of the summary judgment motion differs under the state and city laws, the court holds those claims are pre-empted by the ADA, for the reasons articulated in this Court's opinion in *Abdu-Brisson v. Delta Air Lines, Inc.*, 927 F. Supp. 109 (S.D.N.Y. 1996) (Baer, J.) (on appeal).

BACKGROUND

Plaintiffs are 71 former Pan Am Flight Engineers hired by defendant Delta Airlines as part of Delta's acquisition of Pan Am's Shuttle and Transatlantic Routes in 1991. They allege that the manner in which they were integrated into Delta's pilot seniority list discriminated against them on the basis of age, in violation of the federal Age Discrimination in Employment Act ("ADEA") and New York State and City law.

The Asset Purchase Agreement ("APA") between Pan Am and Delta required Delta to hire at least 700 Pan Am pilots. Moreover, Delta needed to hire such pilots to maintain continuous operation of the routes in question because it did not have sufficient pilots trained to fly the Boeing 727's it was acquiring from Pan Am. The APA also provided that Delta's pilot union (ALPA) had to approve any seniority integration plan for the Pan Am pilots, because pursuant to Delta's Collective Bargaining Agreement ("CBA") with the union, any newly hired pilots would have to be placed at the bottom of Delta's seniority list. Delta negotiated a Supplemental CBA with ALPA, which provided for a "modified status ratio methodology" for integrating Pan Am pilots into Delta's seniority list. This methodology interspersed Pan Am pilots throughout the Delta list, with the Pan Am pilots maintaining their relative seniority to each other.

Plaintiffs' complaint focuses on the integration of Flight Engineers into the Delta list. Flight Engineers, referred to as Second Officers at Delta, are the third members of a three-member cockpit crew in a Boeing 727,

along with a Captain and First Officer. The Flight Engineer/Second Officer position was treated differently at Delta and Pan Am prior to the acquisition. Pan Am Flight Engineers were either (i) Professional Flight Engineers, meaning they could not "bid" for pilot (Captain and First Officer) positions or (ii) pilots, serving in Flight Engineer positions with full "bid" rights based on seniority. Pan Am Flight Engineers were also represented by a separate union (FEIA) than Pan Am pilots (ALPA). Finally, separate seniority lists were maintained at Pan Am for the two positions – i.e., one list for Flight Engineers and another list for pilots. When it came time to merge, therefore, Pan Am provided Delta with these separate seniority lists. At Delta, by contrast, all cockpit personnel[3] were hired as pilots, most of whom served initially in the Second Officer position. All Delta pilots, including Second Officers, had "bid" rights for all pilot positions, were represented by one union (ALPA) and were ranked on one master seniority list.

In initial drafts of the Supplemental CBA, which were shown to the Pan Am pilots pursuant to the APA, Pan Am First and Second Officers were to be ranked against each other, collectively, and then integrated into the Delta list behind Pan Am Captains. *See* Draft Supplemental CBA § 20(F)(2). Moreover, the initial drafts provided that if Pan Am failed to provide a list of First and Second Officers by seniority rank, then the pilots' birthdate would be used to establish rank among them. *See id.* § 20(F)(3).

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[3] The Court prefers "cockpit personnel" to the sexist "airmen" used by the parties.

The final version of the Supplemental CBA, however, did not contain the birth-date fall-back provision, and provided that Second Officers (i.e., Flight Engineers) be ranked according to the Pan Am Flight Engineers' union's (FEIA) seniority list – i.e., Second Officers were to be ranked separate from First Officers. Plaintiffs allege (and defendant does not dispute) that, in violation of the APA, this last minute change to the Supplemental CBA was never shown to Pan Am pilots prior to its execution on August 30, 1991. Plaintiffs also allege that Delta's Vice President for Flight Operations, Capt. Harry Alger, advised Pan Am personnel of this methodology three days before the supplemental CBA was executed. Plaintiffs believe this fact, as well as other evidence described below, supports their contention that Capt. Alger unilaterally changed the ranking system.[4]

The ranking system described above had the following effects. First, all Pan Am Flight Engineers were integrated into the Delta seniority list below Pan Am Captains and First Officers – i.e., the open spots were filled first from the Pan Am pilot list and then from the Pan Am Flight Engineer list. Second, the integration methodology provided that the Pan Am pilots be integrated into a Delta seniority list that reflected expected new hires at Delta. That is, the list contained hundreds of empty "phantom" slots representing expected growth at

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[4] Defendant points to deposition testimony by Alger that he "approved" the revised CBA, and argue that this implies that someone else revised the drafts. While this is a reasonable inference that can be drawn from Alger's testimony, the Court must, on this motion for summary judgment, draw all inferences in favor of plaintiffs.

Delta, and Pan Am pilots were integrated among these phantom slots. Once the list was collapsed as of the effective date of the APA, and the unfilled phantom slots eliminated, Pan Am Flight Engineers occupied the bottom 49 positions of Delta's list. Finally, pursuant to FAA regulation, 14 C.F.R. § 121.383(c), pilots over the age of 60 are prohibited from flying as Captain or First Officer, but are allowed to fly as Flight Engineer/Second Officer. Thus, though the Second Officer position is usually filled by young new-hires at Delta (those men and women starting out and aiming to be Pilots and First Officers), some Pan Am Flight Engineers were former over-60 pilots who had "bid down" to the Flight Engineer position.[5] This resulted in several older cockpit personnel being placed near the bottom of Delta's integrated seniority list.

In addition to their placement at the bottom of the Delta seniority list, plaintiffs rely on certain incriminatory comments found in notes taken by Delta's Capt. Alger in his pre-purchase evaluation meetings with Pan Am.[6] These notes include numerous references to the number of Pan Am Flight Engineers over 60 years old; the number

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[5] Surprisingly, in light of plaintiffs' contentions of age bias, plaintiffs did not identify in their papers (nor did the record indicate) how may Flight Engineers fit into the over-60 category. It is only in response to the Court's prompting at oral argument that plaintiffs subsequently provided this information. They then still left it to the Court to cull the number of over-60 Flight Engineers (apparently six, as of 11/1/91) from the raw data.

[6] At oral argument, plaintiffs also cited deposition testimony of Captain Alger, regarding his belief that the FAA's over-60 rule should apply to Flight Engineers as well as pilots because the effects of age-degradation create safety risks when older Flight Engineers are in the cockpit.

of pilots not expected to retire soon; and derogatory references to "bad apples", a "contaminated workforce", a "dirty deal", and "aged flight engineers". Finally, plaintiffs describe a history of "age adverse employment practices" at Delta that are not directly related to this case.

DISCUSSION

I. Disparate Impact

To the extent plaintiffs are pursuing a disparate impact theory, their claim cannot succeed. In order to state a prima facie case on a disparate impact claim, plaintiffs must show that they are members of a protected class and that the challenged employment practice had a significant disparate impact on that class. *District Council 37 v. New York City Dept. of Parks and Recreation*, 113 F.3d 347, 351-52 (2d Cir. 1997). Plaintiffs fail to meet the second prong of this test.[7] The Pan Am Flight Engineers hired by Delta were *younger*, on average, than the Pan Am pilots hired by Delta. That is, the group that allegedly lost out by being placed at the bottom of the integrated

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[7] Plaintiffs also concede that two of their members were not over 40 years old – and therefore not members of a protected group – as of the time of this action. *See* Pl. Br. at 14 n.10. What plaintiffs failed to note – but what is evident from an examination of the supplemental material provided by plaintiffs after oral argument – is that another three plaintiffs were not 40 years old at the time of the APA and integration. That 5 of the 71 plaintiffs fail to meet the basic age requirement is indicative of plaintiffs' entire approach to this litigation. They (understandably) feel aggrieved by the integration methodology, but have failed to show how that methodology was age-biased (as opposed to "Flight Engineer" biased).

seniority list was younger than the group that was treated better. Plaintiffs argue that the proper comparison for this purpose is between the average age of the Pan Am Flight Engineers and the Delta Second Officers. This is akin to comparing apples and oranges. Any claim of Disparate impact must be based on a comparison of the Pan Am personnel whose rankings were affected by challenged employment action. The Delta Second Officers maintained the same places on the integrated seniority list regardless of the order in which the Pan Am personnel were integrated. It is among the Pan Am personnel that the comparison must be made, and plaintiffs cannot show a disparate impact based on age because those adversely affected were younger as a group than those who benefitted from the challenged action.

Furthermore, a disparate impact theory may not be used to challenge "a bona fide seniority system that is not intended to evade the purposes of" the ADEA. 29 U.S.C. § 623(f)(2)(A). A seniority system is not "bona fide," but rather a "subterfuge" to evade the purposes of the Act, when defendant acted "in bad faith with an age-discriminatory motive" in adopting the challenged system. *Cook*, 647 F. Supp. at 823. Thus, plaintiffs' challenge to the integration of the seniority list must rest on claims of intentional discrimination or disparate treatment, and not disparate impact. *Hiatt v. Union Pacific R.R. Co.*, 65 F.3d 838, 842 (10th Cir. 1995) ("challenges to the routine operations of a bona fide seniority system must rest upon a claim of disparate treatment"), *cert. denied*, 116 S. Ct. 917 (1996). I turn to an examination of plaintiffs' disparate treatment claim.

II. Disparate Treatment

In order to make out a prima facie case of age discrimination, plaintiffs must show that they (1) are members of the protected age group, (2) are qualified for their jobs, (3) suffered an adverse employment action and (4) that the action occurred under circumstances giving rise to an inference of discrimination. *Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2d Cir. 1994). If they meet this burden and defendant comes forward with a legitimate, non-discriminatory rationale for its action – as plaintiffs concede happened here – then plaintiffs must prove that age was a motivating factor in defendant's actions. *Renz v. Grey Advertising, Inc.*, ___ F.3d ___. 1997 WL 433675 at *4 (2d Cir. Aug. 4, 1997).

Delta argues that plaintiffs have failed to state a prima facie case because they have not demonstrated that the integration of the seniority lists occurred in circumstances giving rise to an inference of discrimination and that in any event plaintiffs have failed to demonstrate that age was a motivating factor in Delta's decision regarding integration of the pilot lists. Plaintiffs concede that Delta came forward with legitimate non-discriminatory rationales for its actions: Pan Am provided Delta with two separate seniority lists; the hiring practice at Pan Am was such that new hires filled the Second Officer/Flight Engineer positions and were thus at the bottom of the Delta seniority list; and Delta treated all Pan Am hires within each category (Captain, First Officer, Second Officer) equally, regardless of age.

Courts faced with similar cases have held that distinctions based on airline of origin, bidding practices at

the two airlines, and expected success of the airlines at the time of integration are all valid factors that may be taken into account in creating and a viable integration methodology. *See Bovers v. Flying Tiger Line, Inc.*, 979 F.2d 291, 297-98 (2d Cir. 1992) (affirming summary judgment to defendants where "the motivating distinction [in determining post-merger seniority] was the airline of origin"; focusing on factors including premerger bid rights and prognosis for future employment at each of the airlines); *Cook v. Pan American World Airways, Inc.*, 647 F. Supp. 816 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 1030 (2d Cir. 1987).

Plaintiffs' argument that the integration methodology was motivated by discriminatory motive focuses on the derogatory comments contained in Capt. Alger's notes and deposition transcript and Delta's alleged history of age discrimination. Such comments certainly reflect a bias toward older pilots, and the deposition testimony in particular evinces a bias based on the sort of age-based stereotypes that the ADEA was meant to combat. *But see Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997) (affirming summary judgment for Delta in case brought by former Pan Am pilots notwithstanding plaintiffs' reliance on unidentified "unconnected fragments of evidence in which Delta personnel might be understood to be making reference to age").[8]

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[8] The Court recognizes that the fact scenario at issue in *Criley*, involving only pilots over 55 years of age who would be required to retire within five years pursuant to the FAA regulation, is distinguishable from the facts present here. Nevertheless, the Second Circuit's affirmance of Judge Weinstein's grant of summary judgment in *Criley* indicates that the mere existence of some evidence of age awareness coupled

Plaintiffs also make much of the last-minute change in the Supplemental CBA that resulted in Flight Engineers being integrated according to the separate FEIA list provided by Pan Am, as opposed to being ranked by birth-date with First Officers. They also point to Capt. Alger's phone call to Pan Am's Richard Burke in which Alger referenced this ranking methodology – three days prior to the adoption of this change in writing – as proof that Alger was behind the change. Finally, they cite the testimony of a Mr. Spallding from Delta, who testified that Capt. Alger had the power to change a draft of the Supplemental CBA. This evidence, plaintiffs contend, raises an inference that Captain Alger – he of impermissible age-based bias – was responsible for the change in the Supplemental CBA.

Up to this point, all is well and good for plaintiffs. What plaintiffs fail to show, however, is a connection between the integration methodology adopted by Captain Alger (crediting plaintiffs with the inference that Captain Alger unilaterally changed the CBA) and age-based bias. As noted above, plaintiffs *as a group* are *younger* than the First Officers who allegedly benefitted at their expense from Captain Alger's machinations. Such a comparison, therefore, cannot raise an inference of age-based discrimination because its effect is to reward older pilots.[9]

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with an adverse action does not suffice to enable plaintiffs to go to trial without more.

[9] Plaintiffs object to this analysis, contending that they are not required to establish that they were treated differently than any similarly-situated but younger group in order to survive

At oral argument, plaintiffs advanced a slightly more compelling theory. Because of the FAA regulation, the only Pan Am cockpit personnel (Captains, First Officers and Flight Engineers) that included among their members individuals over 60 years old were the Flight Engineers. Captain Alger was certainly aware of this, as his notes indicate. Because of his bias against cockpit personnel over 60, plaintiffs argue, Captain Alger collectively punished the entire group of Flight Engineers (who, as noted, were younger on average than the First Officers) by placing them at the bottom of the seniority list.

While appealing at first blush, this theory too cannot withstand scrutiny.[10] Those plaintiffs most affected by the change in the Supplemental CBA are those Flight Engineers over 60 years of age. By definition, they would have been placed in the top positions of the joint birth-date ordered seniority list that plaintiffs claim would have been prepared had the Supplemental CBA not been changed. Yet it is these same over-60 Flight Engineers who cannot – pursuant to FAA regulation – bid on Captain or First Officer positions. Rather, they are limited to bidding on Flight Engineer spots against either (i) Pan

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summary judgment. While this is technically true – plaintiffs need only adduce evidence that can establish that discrimination was a motivating factor in defendant's action – plaintiffs have failed to articulate any theory by which the integration advances a discriminatory motive. The mere fact that Capt. Alger was biased cannot, without more, defeat this properly supported summary judgment motion.

[10] Indeed, plaintiffs failed to articulate the details of such a theory, arguing simply that the entire group of Flight Engineers was "punished" by Capt. Alger.

Am Flight Engineers or (ii) incumbent Delta Flight Engineers (called Second Officers). Yet the change in the CBA had little or no impact on these plaintiffs' ability to compete against these two groups. These over-60 Flight Engineers maintained their seniority rank vis a' vis the other, younger Pan Am Flight Engineers, and thus were not adversely affected in their ability to bid against them. As for their bidding rights against the incumbent Delta Flight Engineers, plaintiffs have failed to present evidence that the integration method ultimately adopted resulted in any adverse impact on the Flight Engineers' bidding rights for *flight engineer* positions. These Flight Engineers were, in theory, at the top of the FEIA seniority list, and thus not at the very bottom of the Delta list after integration. The incumbent Delta Second Officers with whom they were competing were at the bottom of the Delta list prior to integration. While it is theoretically possible that the over-60 plaintiffs' bidding rights were adversely affected, plaintiffs have failed to present any evidence to show this was the case.

The same is true for the under-60 Pan Am Flight Engineers. Their positions on the Delta list could have been adversely affected by the changes in the Supplemental CBA in one of two ways also: vis a' vis their Pan Am colleagues or vis a' vis their new Delta colleagues. Like the over-60 Flight Engineers, the other Pan Am Flight Engineers maintained their relative positions vis a' vis other Pan Am Flight Engineers. Plaintiffs contend that some of these individuals lost their seniority ranking vis a' vis those Pan Am First Officers who were junior to them. The problem is that plaintiffs fail to adduce any evidence to support this contention. They contend that

"[t]he placement of the Pan Am flight engineers at the bottom of the Delta seniority list resulted in flight engineers with 15 to 35 years of relative seniority at Pan Am being placed junior to junior Pan Am captains and first officers at Delta." Pl. Rule 3(g) Statement ¶ 37. The *only* evidentiary support for this statement is an unsupported letter of protest from FEIA, the flight engineers' union, to Delta.

With regard to the impact on the under-60 Flight Engineers' positions vis a' vis their Delta counterparts, plaintiffs have also failed to establish any age-based discriminatory effects resulting from the Supplemental CBA. The older these plaintiffs are, the higher they would have been placed on the seniority list had it been ordered by birth-date, and the greater the possible impact the change in integration methodology would have had on them. But, at the same time, the older the plaintiff, the higher he or she was (presumably) placed on the Flight Engineer list ultimately used for integration, thus limiting the impact of the change. Again, plaintiffs assert that "[t]he placement of the Pan Am flight engineers at the bottom of the Delta seniority list resulted in flight engineers with 15 to 35 years of relative seniority at Pan Am being placed among the most recent new hires at Delta, some with less than one year of seniority." Pl. Rule 3(g) Statement ¶ 38. Again, the only evidentiary support for this contention is the same letter from FEIA to Delta.[11]

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[11] Plaintiffs also allege that as a result of the change in the CBA, "[p]laintiffs were among the first airmen to be furloughed by Delta in 1993." Pl. Mem. at 15. This claim suffers from the same fatal flaws as plaintiffs' other claims. First, plaintiffs cite

Absent some concrete evidence that plaintiffs – or particular plaintiffs – actually suffered some adverse impact as a result of the change in the Supplemental CBA, plaintiffs cannot survive the motion for summary judgment. Plaintiffs could have submitted evidence showing that particular plaintiffs suffered some age-related adverse consequence as a result of the change in the Supplemental CBA. Such evidence could include a comparison between the actual seniority list used by Delta and the seniority list that would have been used under the birth-date ordering methodology, coupled with an analysis explaining how older persons fared worse under the integration approach ultimately adopted. While plaintiffs submitted a comparison of the two lists in response to the Court's prompting at oral argument, they have not taken the critical next step of explaining how the differences in the two lists were age-related. Plaintiffs rely solely on the fact that Pan [sic] Flight Engineers were placed on the Delta list below Pan Am First Officers. Absent an explanation – let alone a showing – that this fact had a discriminatory effect, plaintiffs' claims must be dismissed. It would be reasonable to draw an inference of discriminatory motive based on Captain Alger's notes and statements *if his actions served to advance an age-biased agenda*. Because plaintiffs have failed to

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no evidence in support of this contention. Second, even if this were factually true, plaintiffs have not articulated how this has anything to do with age or the change in the Supplemental CBA. Presumably, those plaintiffs who were furloughed were at the bottom of the FEIA list used in the integration and would also have been at the bottom of the birth-date ordered list they contend should have been used.

establish any adverse age-related effect, Delta's summary judgment motion must be granted.[12]

Plaintiffs also allege discrimination on the basis of (i) Delta's refusal to allow Professional Flight Engineers (PFEs) to bid for Captain and First Officer positions and (ii) the three-year period it took Delta to increase plaintiffs' pay to equal that of Delta Second Officers. These claims are easily disposed of. As to the PFEs, as noted above, they were barred from bidding for pilot positions at Pan Am and courts have recognized the legitimacy of maintaining pre-merger bidding distinctions. *Bovers*, 979 F.2d at 297-98; *Cook*, 647 F. Supp. at 819-20. Furthermore, there is no evidence to support the contention that the PFEs are older than either the Delta Second Officers or the other Pan Am Flight Engineers.[13] As to the incremental pay increases, the pay of *all* Pan Am hires was "phased up" over a three-year period and plaintiffs have put forth absolutely no evidence to indicate this was anything other than an economic decision or, again, that it had any negative impact correlated to age.

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[12] It is not at all clear that a showing that some plaintiffs fared worse under the integration plan ultimately adopted would suffice to defeat summary judgment. By necessity, some Pan Am personnel would fare worse than others under *any* plan adopted. Absent a showing that older persons or members of the protected class fared worse under the plan adopted, summary judgment would still be appropriate.

[13] Indeed, the oldest Pan Am Flight Engineers are barred from bidding for the pilot positions by FAA regulation.

CONCLUSION

For the reasons stated above, the motion for summary judgment is GRANTED and the complaint is DISMISSED. The Clerk of the Court is instructed to close the file.

SO ORDERED.

Dated: October 8, 1997
New York, New York

/s/ Harold Baer, Jr.
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC H. ADAMS, et al., **Plaintiffs,** **-against-** **DELTA AIR LINES, INC. and the AIR LINE PILOTS ASSOCIATION,** **Defendants.**	**96 Civ. 2871 (HB)** **MEMORANDUM AND ORDER**

HAROLD BAER, JR., District Judge:

Plaintiffs move for reconsideration of this Court's Opinion and Order dated October 6, 1997 granting defendants' motion for summary judgment and dismissing the complaint. The motion for reconsideration is GRANTED. For the reasons discussed below, the Court adheres to its original Opinion and Order and the complaint is DISMISSED.

Plaintiffs raise two issues worthy of comment in their motion for reconsideration. First, they contend that the Court granted summary judgment for reasons not raised in defendants' motion papers. While in some circumstances this might justify a different result, this is not such a case. I heard extensive oral argument on the motion, at which time I informed plaintiffs of my concerns and invited the submission of additional material. Plaintiffs submitted such materials, which I relied upon

and referred to in my opinion. *See* Opinion and Order at 12. After being fully apprised of the Court's concerns and provided with an opportunity to submit additional material in response to these concerns, plaintiffs cannot now be heard to complain that they were somehow prejudiced by the fact that the Court decided the motion based on those expressed concerns.

Plaintiffs also argue that the Court erred in "applying the same standard to Plaintiffs' city law claims that it applied to the federal and state law claims." Pl. Mem. at 6. In support if [sic] this argument, plaintiffs rely on dicta in a Report and Recommendation written by Magistrate Judge Peck. *Burger v. Litton Indus., Inc.*, No. 91 Civ. 0918 (WK) (AJP), 1997 WL 421449 (S.D.N.Y. April 25, 1996), *recommendation adopted*, 1996 WL 609421 (S.D.N.Y. Oct. 22, 1996) (Knapp, S.J.). After citing a handful of cases applying the *McDonnell Douglas* analysis to New York City discrimination claims, Judge Peck noted that the legislative history of the City's Human Rights Law indicated it was "to be even more liberally applied than the federal and state anti-discrimination laws." *Id.* at *19. In light of his conclusion that the claims before him survived summary judgment under the federal standard, Judge Peck noted that he "need not decide the scope of the more liberal interpretation to be given the [City law claims]." *Id.* Plaintiffs have not cited, nor has the Court located, any cases applying the "more liberal" standard that plaintiffs opine is applicable to City Human Rights Law claims. *See Torres v. Pisano*, 116 F.3d 625, 629 n.1 (2d Cir. 1997) (noting *Burger*'s "suggestion" that City law claims are to be more liberally construed, but not reaching issue); *Hernandez v. New York City Law Dep't Corp. Counsel*,

No. 94 Civ. 9042 (AJP) (SS), 1997 WL 27047 (S.D.N.Y. Jan. 23, 1997) at *13 n.10 (same). In fact, as noted by Judge Peck in *Burger*, the weight of authority is that such claims are to be decided under the same test as is applicable to state and federal discrimination laws. *Burger*, 1997 WL 421449 at *18 (citing cases).[1]

For the reasons discussed above, the motion for reconsideration is GRANTED. Upon reconsideration the Court adheres to its original opinion, defendants' motion for summary judgment is GRANTED and the complaint is DISMISSED.

SO ORDERED.

Dated: December 30, 1997
New York, New York

/s/ Harold Baer, Jr.
U.S.D.J.

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[1] Plaintiffs also failed to raise this argument in their initial motion papers. Pursuant to their own reasoning, it would be unfair to defendants were the Court to rely on this ground as a basis for denying defendants' motion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

(Filed Apr. 28, 1999)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of April one thousand nine hundred and ninety-nine.

Adams

Plaintiff-Appellant,

v

Dkt No: 98-7120

Delta Air Lines, Inc

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant's Erich H. Adams, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the

appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

ASSET PURCHASE AGREEMENT

ASSET PURCHASE AGREEMENT dated July 27, 1991 among Pan Am Corporation, a Delaware corporation ("Parent"), Pan American World Airways, Inc., an indirect wholly-owned subsidiary of Parent and a New York corporation ("Airways"), Pan Am Shuttle Inc., a wholly-owned subsidiary of Parent and a Delaware corporation ("Shuttle"), debtors-in-possession (Shuttle and Airways being referred to herein collectively as "Sellers" and each individually as a "Seller"; where appropriate, the terms Seller or Sellers shall refer only to the applicable Seller), and Delta Air Lines, Inc., a Delaware corporation ("Buyer").

RECITALS:

WHEREAS, each Seller is an air carrier, as defined in the Federal Aviation Act of 1958, as amended (the "Aviation Act"), and engages in the air transportation of persons, property and mail; and Sellers desire to sell certain assets described in Sections 2.1 and 2.2 hereof (defined herein as the Purchased Assets).

WHEREAS, Buyer is an air carrier, as defined in the Aviation Act, and engages in the air transportation of persons, property and mail; and Buyer desires to purchase the Purchased Assets.

WHEREAS, contemporaneously herewith Buyer has agreed to extend credit to Parent and certain of its subsidiaries pending the completion of the transactions contemplated herein pursuant to the Credit Agreement dated as

of the date hereof (the "DIP Agreement") among Buyer, Parent and certain of its subsidiaries.

WHEREAS, the proceeds of Sellers' sale of the Purchased Assets are to be applied in part in repayment of amounts outstanding under the DIP Agreement.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and conditions contained herein, the parties hereto agree as follows:

* * *

[p. 52] accordance with subsection 5.9(h). Buyer will determine in its sole discretion the number of Sellers' employees to be offered employment in each location and classification, and the terms and conditions of their employment. Sellers' employees in any classification shall be required to resign from Sellers' employment, in a manner which does not give rise to Severance Liability, as a condition of accepting Buyer's offer of employment. The employees who accept and commence employment with Buyer (including Foreign Employees whose employment is continued with Buyer by operation of law) are hereinafter referred to collectively as "Transferred Employees". Employees on medical, maternity and military leave, and employees on personal leave who are willing to return to work on the dates specified by the Buyer, who are offered employment by Buyer shall not become Transferred Employees until they commence active service with Buyer. The provisions of this subsection 5.9(b) shall apply to Foreign Employees to the extent permitted by applicable law.

(c)(i) Except where not practicable because of the constraints of foreign law and subject to (x) subsections 5.9(c)(ii) hereof and, with respect to pilots, 5.9(h) hereof and (y) to reaching the agreement with Buyer's pilots, as represented by ALPA, described in Section 6.11 hereof,

(A) By no later than August 1, 1991 Buyer shall advise Sellers in writing of the number of Sellers' employees, broken down by location and job classification, to be employed by Buyer. Buyer may revise such numbers within a reasonable period of time based upon good faith, unanticipated revisions to Buyer's operating plans.

(B) By no later than August 15, 1991 Buyer shall advise Sellers in writing of the material terms and conditions upon which offers of employment to the selected Sellers' employees will be made; *provided* that Buyer may be unable to finalize all of the terms of seniority integration until after the Transferred Employees have been identified, in which case Buyer will provide a description of Buyer's objectives and intentions with respect to seniority integration, as well as, a description of the seniority integration methodologies that Buyer is likely to use.

(C) By no later than October 1, 1991 Buyer shall provide Sellers with the names of all employees to be given offers of employment; provided that, if some of Sellers' employees do not accept such offers of employ-

* * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CASE NO. 96-2871 (HB)

ERICH H. ADAMS, et al.,

Plaintiffs,

vs.

DELTA AIR LINES, INC. and the AIR LINE PILOTS ASSOCIATION (joined pursuant to Fed.R.Civ.P. 19),

Defendant.

_____/

PLAINTIFFS' MOTION TO STRIKE DELTA'S SEPTEMBER 30, 1997 RESPONSE

Plaintiffs, ERIC H. ADAMS, et al., through undersigned counsel, hereby move to strike the Delta Air Lines, Inc.'s September 30, 1997 Response (the "September 30 Response"), and state:

1. In its September 30 Response, Delta misrepresents the record before the Court with respect to a material fact bearing on the Motion for Summary Judgment. Delta states that "[i]t is *undisputed* that plaintiffs are not similarly situated to the Pan Am pilots (Captains and First Officers) who were hired into more senior cockpit positions than plaintiffs." *See* September 30 Response, p 2 (emphasis in original). However, Delta is well aware that in their Memorandum of Law in Opposition to Delta's Motion for Summary Judgment (Plaintiffs' Response), Plaintiffs do, in fact, dispute this very issue. *See* Plaintiffs'

Response, pp 11-12.[1] Nonetheless, Delta carelessly – or deliberately – misrepresents a disputed issue of fact as undisputed. This misrepresentation is particularly important in the present context as it is well established that disputed issues of material facts preclude the entry of a summary judgment.

2. In addition, in its September 30 Response, Delta argues in favor of *its* interpretation and *its* view of disputed factual issues and evidence. However, the law requires that all disputed factual issues be resolved in favor of Plaintiffs (non-movants), and the Court must view the evidence, draw all permissible factual inferences and resolve all ambiguities in favor of the non-moving party. Thus, this Court must ignore Delta's argument – that Alger eliminated the reference to date of birth integration from the Supplemental CBA because it was no longer necessary – in favor of Plaintiffs' theory that Alger eliminated the reference to date of birth integration because he knew that it would favor the Flight Engineers against whom he was hopelessly biased because of their ages.

3. As stated in Plaintiffs' September 29, 1997 Supplement to Opposition to Delta's Motion for Summary Judgment, date of birth integration was included in the drafts of the Supplemental CBA as late as August 26, 1991, but was eliminated, by Alger, from the final version

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[1] In their Response, Plaintiffs also show that, under age discrimination law, Delta's "similarly situated" argument is not part of Plaintiffs' prima facie case. Since this "similarly situated" argument forms the basis of Delta's Motion for Summary Judgment; Delta's Motion must fail. *Id.* at 10.

of the CBA, dated August 30, 1991. Thus, Delta's explanation – which Plaintiffs dispute – would be plausible only if Pan Am had first provided Delta with the two Pan Am seniority lists between August 26, 1991 and August 30, 1991. Of course, there is not a single piece of documentary or testimonial evidence to support this latest Delta theory.

4. Instead, the evidence shows that Delta was well aware of the two Pan Am seniority lists long before August 30, 1991. Captain Alger's handwritten notes of his meetings with Pan Am's Captain Afourtit *in the spring of 1991*[2] contain numerous references to the two Pan Am seniority lists. For example, in DL-AB 07006, Captain Alger writes, "DL [Delta] needs to insist 1.F/E [flight engineer] pilot single list." *See* Exhibit "B" attached hereto. Similarly, in DL-AB 07010, Alger writes, "Merge Both Lists." *See id.* Alger's type-written notes confirm that the "Lists" referenced in DL-AB 07010 are the Pan Am ALPA and FEIA lists. *Id.* Continuing, in DL-AB 07012, under the "Negative" column, Alger writes, "consolidation of ALPA FEIA lists." *Id.* Thus, Delta cannot dispute that it was fully aware of the two Pan Am seniority lists long before Alger eliminated the reference to date of birth integration from the Supplemental CBA between August 26 and August 30, 1991.

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[2] *See* excerpts of transcripts of Captain Alger's depositions taken in this action and in the *Abdu-Brisson v. Delta Air Lines, Inc.*, No. 94-CIV-8-494 (HB) (S.D.N.Y.) case, attached hereto as Exhibit "A." Alger's notes were marked and identified as Plaintiffs' Exhibit 100 in the *Abdu-Brisson* case.

5. Under Delta's new and unsupported rationale, the date of birth "default" provision was unnecessary since, at least, Spring, 1991, and should not have been included in any of the early drafts of the Supplemental CBA. Obviously, this is not the case; every draft of the Supplemental C.A. contained the date of birth provision. Thus, Delta's explanation for the sudden disappearance of the date of birth integration provision is both disputed and implausible, and cannot support Delta's Motion for Summary Judgment.

6. Delta also argues, presumably for the first time, that "there is no evidence that Alger ever reviewed or even knew of the rejected 'default' provision." *See* Delta's September 30 Response, n.1. This argument is addressed in paragraph 27 of Plaintiffs' Counter-Statement of Material Facts Pursuant to Local Rule 3(G) ("Plaintiffs' 3(G) Statement") which provides:

> 27. Correspondence from Richard Burke, Chairman of the Pan MEC, to Captain Alger, dated August 27, 1991, confirms a telephone conversation wherein Captain Alger advised Burke of Delta's method for establishing seniority of the Pan Am airmen. (Sherouse Aff ¶ 22, Ex. 21, pp. 79-80; Sherouse Aff. ¶ 33, Ex. 32 at DL-AB 06769). According to Burke's correspondence, this telephone conversation took place three days *before* the final version of the Supplemental. CBA surfaced containing the previously unseen changes to Section 20(F). (*Id.*) According to Burke's correspondence, Alger described the method for establishing seniority which was eventually contained in the final version of Section 20(F) of the Supplemental CBA but which, as of August 27, had not appeared.

(Sherouse Aff ¶ 22, Ex. 21, pp. 79-80; Sherouse AFF. ¶ 33, Ex. 32; Sherouse Aff. ¶ 32, Ex. 31). Alger had the authority to change Section 20 unilaterally at any time. (Sherouse Aff ¶ 22, Ex. 21, pp. 80-81)

Drawing every permissible inference in favor of Plaintiffs, Delta's argument, at most, creates another disputed issue of material fact which precludes summary judgment.

ZWERLING, SCHACHTER & ZWERLING, LLP

By: /s/ Robin F. Zwerling
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[p. 1] UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ERIC H. ADAMS, ET AL., PLAINTIFFS, VS. DELTA AIR LINES, INC., AND THE AIR LINE PILOTS ASSOCIATION (JOINED PURSUANT TO F.R.C.P. 19) DEFENDANTS.	CASE NO. 96-CIV-2871

LEESBURG, VIRGINIA
THURSDAY, MAY 15, 1997

VIDEO DEPOSITION OF

DANIEL JOSEPH AFFOURTIT JR., A WITNESS, WAS CALLED FOR EXAMINATION BY COUNSEL FOR THE PLAINTIFFS, PURSUANT TO NOTICE, TAKEN AT THE OFFICES OF REMAX, 305 HARRISON STREET, S.E., SUITE 200, LEESBURG, VIRGINIA, BEGINNING AT 10:45 A.M., BEFORE JODI SCHEFFEL, A NOTARY PUBLIC IN THE COUNTY OF FAIRFAX, STATE OF VIRGINIA, WHEN WERE PRESENT ON BEHALF OF THE RESPECTIVE PARTIES:

* * *

[p. 29] Q. Did it cause you any concern that for the purposes of safety or qualifications, in general, that Pan

Am had 68 flight engineers who were over 60 years old or four that were over 70?

A. No.

Q. And why not?

A. In my view, most of the professional flight engineers – you could throw pilots parts on the ramp and they'd build you the airplane in time for the departure. They gave me no anxiety whatsoever, in terms of the fact that they were over age 60.

Q. Is there any way – did you – did you at any time in talking to Alger relate to him anything about age that was negative?

A. No. I was 55 years old myself at the time, so I doubt if I would have reflected on 60-year-olds or over 60-year-olds as being a negative, okay? And on top of that, I had already been through an analysis, during the time frame that I was the vice president of flight operations, with regard to the question of the older airmen.

Pan American being, quote, financially

* * *

[p. 33] So the part that I read is the part that I would like to ask you about.

MR. BOICE: Objection in that you have not properly indicated that. The "Contaminated work force, especially since '87," then there is a parenthetical with an arrow that says, "Not meet Delta standards," referring to that phrase.

BY MR. SHEROUSE:

Q. Okay. With the objection noted, I'd like to ask you some questions about the meeting that you had with Alger. And what I'm going to focus on now is opinions that you had and words that you expressed at that meeting, in the context of the phrase that I've just read to you. And I'd like to break it down.

With regard to the airmen, was there anything that you felt was contaminated about the work force, as you sat in that room or those meetings with Harry Alger?

A. I can't imagine my using the word "contaminated" with regard to –

Q. With airmen?

A. Airmen.

* * *

[p. 43] Did you use, to Harry Alger, in that conversation, the term "bad apples" to describe any airmen at Pan Am?

MR. BOICE: Objection to taking the phrase out of context.

MR. SHEROUSE: You can go ahead.

A. No.

Q. Going to Page 7,007. At the top of Page 7,007 is the phrase "dirty deal," and then that is followed by the sentence or the phrase "last 20 years drawing garbage."

Did you use the term, in any form or fashion, or say things to the effect that somebody would draw the conclusion that there was some dirty deal about what Pan

Am had gotten in the way of airmen in the last 20 years before 1991?

A. No.

Q. Did you feel, or have you ever felt, that there was something – a dirty deal or something that was negative, or bad, or contaminated, or anything like that about the airmen that Pan Am had drawn in the last 20 years?

* * *

[p. 49] generalities of it and description, the overall description you just gave, but do you recall that it would be your suggestion to him, specifically, that he pay off the professional flight engineers for some reason?

A. No.

Q. Now, going to what you had been talking about, and, in fact, on this same page which is 7,012, a little further down under the general heading "Political," there is a handwritten comment by Alger, "Consolidation of ALPA FEIA list."

Does this comment here apparently relate to what you were just talking about?

A. Yes.

Q. Could you explain so that this makes some sense, with regard to the Pan Am perspective, what the A-L-P-A or ALPA list was, the official Pan Am list, and what the FEIA list was, the official Pan Am list?

MR. HERMAN: Object to the form.

MR. BOICE: Object to the question. Again, taking material out of context. I'll also join in the objection of Mr. Herman.

* * *

[p. 55] A. The conversation or our meeting would have ended had he suggested anything like that about Pan American airmen.

Q. Going back to this issue of the single list, did Delta ever request of you a single list?

A. Yes.

Q. And when was that?

A. At some point in our – you know, I'm not going to point to a date or time, but certainly I can recall their requesting to be able to operate from a single list. And that produced an explanation from us that you can take our two lists and put them together for whatever exercise you'd like, but we don't have a single list. Because as I've earlier explained, former National pilots can't go on the engineer listing. Former National engineers can't go on the pilot list. But if they wish to create a single list for purposes of whatever exercise they were going to do at Delta, it certainly would seem to me, and I can recall stating, that's not a complicated process.

Q. Did anybody ask you the specifics of this process to put the two lists together?

(LOGO) PAA-MEC OFFICE
AIR LINE PILOTS ASSOCIATION
201 MADEIRA AVENUE Q CORAL GABLES, FLORIDA
[ ] (305) 448-6968

August 27, 1991

CONFIDENTIAL

Mr. Harry Alger
Senior Vice President-Operations
Delta Air Lines, Inc.
Hartsfield-Atlanta International Airport
Atlanta, GA 30320

Dear Captain Alger:

Per our conversation this morning of 27 August 1991, it is our understanding that the first 698 slots devoted to acquired pilots on the Delta Pilot Seniority List will be filled by pilots from the Pan American Pilots Seniority List, in seniority order relative to that list. It is further understood that the next 84 slots, numbers 699-782, will be filled by engineers from the Pan American Flight Engineer Seniority List, in seniority order relative to that list.

Yours truly,

/s/ Richard L. Burke
Richard L. Burke
Chairman, PAA MEC

ADAMS et al. vs. DELTA AIR LINES, INC. CASE NO. 96-2871

SEPTEMBER 29, 1997 SUPPLEMENT TO PLAINTIFFS' OPPOSITION TO DELTA'S MOTION FOR SUMMARY JUDGMENT

The integration of Pan Am airmen into the Delta seniority list is covered in Section 20 of the Supplemental Collective Bargaining Agreement ("Supplemental CBA"). Under the Asset Purchase Agreement approved by the Bankruptcy Court (the "APA"), Delta was required to advise Pan Am, in writing, no later than August 15, 1991, of the terms and conditions upon which offers of employment would be made to Pan Am employees, including Delta's intentions with respect to seniority integration and the seniority integration methodology that Delta intended to use. (Sherouse Aff. ¶ 30, Ex. 29 ¶ 5.9(c)(i)(B)). Delta fulfilled this requirement by publishing Section 20 to the Pan Am airmen (albeit untimely-on August 26) after numerous reviews and revisions by Delta management and Delta ALPA.[1] Because it would directly affect their seniority status, this information was crucial to Plaintiffs' ability to make an informed decision to accept or reject employment at Delta.[2] The Supplemental CBA which was published pursuant to the APA contained a

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[1] Delta ALPA was concerned solely with the creation and location of the Pan Am slots on the Delta seniority list, *not* with the ordering of the Pan Am list.

[2] As discussed in Plaintiffs' Response to Delta's Motion for Summary Judgment, a pilot's seniority rank affects almost every important aspect of his working life including the aircraft and routes that he can fly, the income he can earn, his pension upon retirement and his job security.

clause, Section 20(F)(3), which provided that if Pan Am were unable to Supply Delta with the seniority rank order of the acquired Pan Am airmen, their seniority rank order would be determined by their respective dates of birth.[3] *See* Sherouse Aff. ¶¶ 26, Ex. 25, at § 20(F)(3). Delta has repeatedly stated that it asked Pan Am for a single seniority list that included all Pan Am airmen but that Pan Am could not provide such a list. Delta's Memorandum, pp. 6-7, 11; Delta's Reply, p. 2; Greenberg Affidavit, ¶ 8. Thus, pursuant to Section 20(F)(3) of the Supplemental CBA published pursuant to the APA, Plaintiffs should have been integrated into the Delta list together with the First Officers, on the basis of date of birth.

Section 20 dealt fairly with the Flight Engineers in relation to the First Officers, as a combined list would have done. This, however, was unacceptable to Captain Alger. Alger did not want the age-contaminated group (the Flight Engineers)[4] to receive the fair treatment set out in Section 20. Since these were the people whom – because of their ages – Alger was especially biased against, he had to ensure that they did not benefit from date of birth integration or any other fair integration method. Thus, after providing Plaintiffs with a draft of

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[3] In fact, until it was eliminated by Alger from the August 30, 1991 (final) version, every single draft of the Supplemental CBA contained this reference to date of birth integration. *See* Spalding depo transcript; Alger depo transcript, p 130; Sherouse Aff. ¶¶ 26, 27, 29, 31, 32, Ex. 25, 26, 28, 30, 31 at § 20(F)(3).

[4] In Alger's eyes, the Flight Engineers are the only "contaminated" group because only they represent a significant number of "old" airmen approaching sixty, over sixty and, indeed, over seventy who are entitled to remain in the cockpit.

the Supplemental CBA, Alger, unilaterally, and without notice to Plaintiffs, eliminated any reference to date of birth integration and otherwise altered Section 20 of the final version of the Supplemental CBA to ensure that Plaintiffs would wind up at the bottom of the Delta seniority list. *See* Alger depo tr., p. 130.

Accordingly, after changing Section 20 to Plaintiffs' detriment, Delta integrated the Pan Am Flight Engineers at the bottom of the Delta seniority list. In fact, Delta has admitted that "every place from 9226 through 9274 (the end) on the [Delta] integrated seniority list was filled by a former Pan Am *flight engineer.*" Excerpt of Delta's Reply Memorandum in Support of Defendant Delta Air Lines, Inc's Motion for Summary Judgment in *Abdu-Brisson vs. Delta Air Lines, Inc.*, 94 CIV8494(HB) (S.D.N.Y.), attached hereto as Exhibit "A." In fact, Delta assigned Frank Nylas, the most senior Pan Am Flight Engineer, seniority number 8843 out of 9274. Thus, 95.35% of all airmen on the Delta seniority list were senior to the *most senior* Pan Am Flight Engineer. Of course, all of the remaining Pan Am Flight Engineers received seniority numbers below Mr. Nyilas. Thus, 43 of the 71 Plaintiffs received seniority rankings in the bottom *one percentile* of the Delta seniority list. *See* Excerpt of the Delta Pilot System Seniority List for November 1, 1991, attached hereto as Exhibit "B." As a result of their dismal seniority status at Delta, Plaintiffs were among the first to be furloughed by Delta in 1993, resulting in millions of dollars of damages to Plaintiffs. Generally, to avoid furlough required a Delta seniority number of approximately 8900 or better. However, only 5 of the Flight Engineers received a seniority number of 8900 or better. *See* Exhibit "B." Thus, almost every Pan

Am flight engineer was furloughed by Delta, many remaining unemployed for two years or more. Moreover, those who were not furloughed were unable to hold their positions once Delta second officers – with better seniority rankings – were permitted to bid for their seats. Thus, Delta's discriminatory integration of Plaintiffs had severe consequences on Plaintiffs' employment.

Attached as Exhibit "C" is a list of the 513 Pan Am First Officers and Flight Engineers acquired by Delta ranked by date of birth – Captains are integrated ahead of the Flight Engineers and First Officers, Exhibit "D" is a list of the 71 Plaintiffs after integration into the Delta seniority list (by date of birth) and contains each Plaintiff's seniority ranking by number and percentile. As is evident, date of birth integration results in Plaintiffs being integrated evenly throughout the bottom half of the Delta seniority list. By contrast, Delta's integration (Exhibit "B") lumps Plaintiffs at the very bottom of the Delta list. Under date of birth integration, only seven Plaintiffs receive a Delta seniority ranking of 8900 or worse; thus, the remaining 64 Plaintiffs would have avoided furlough. By contrast, under Delta's integration, 66 of 71 Plaintiffs receive seniority rankings of 8900 or worse. Under date of birth integration, Pan Am's senior Flight Engineer, Frank Nyilas, receives a seniority ranking in the forty fifth percentile (no. 4248) on the Delta seniority list. Mr. Nyilas' seniority was in the bottom 5 percentile (no. 8843) under Delta's integration method. Clearly, Captain Alger's last minute changes to Section 20 had their intended catastrophic effect on Plaintiffs'

employment conditions while providing no economic benefit whatsoever to Delta.[5]

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[5] Based upon the plethora of age-biased comments and testimony of Captain Alger quoted in Plaintiffs' papers in opposition to Delta's Motion for Summary Judgment and at the oral argument on Thursday, September 25, 1997, Plaintiffs are entitled, for purposes of this Motion, to the factual inference that Captain Alger's actions against Plaintiffs were motivated by age bias. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (in ruling on a motion for summary judgment, the court must view the evidence, draw all permissible factual inferences and resolve all ambiguities in favor of the non-moving party.) The inference of age bias is particularly appropriate here because there was no economic benefit to Delta in forcing Plaintiffs to the bottom of the Delta seniority list. It merely allowed Alger to give effect to his age bias. Indeed, Delta has repeatedly stated that the order of integration of the Pan Am airmen into the Delta's pilot seniority list "made little difference to Delta." *See* Delta's Reply p.2; Delta's Memorandum in Support of its Motion for Summary Judgment, at p.6; Affidavit of H. David Greenberg, ¶ 8.

[p. 1] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ERICH H. ADAMS, et al., Plaintiffs, vs. DELTA AIR LINES, INC., and AIR LINE PILOTS ASSOCIATION, joined pursuant to FRCP 19, Defendants.	CIVIL ACTION FILE NO. 96-CIV-2871

VIDEOTAPE DEPOSITION OF

HARRY ALGER

March 21, 1997

9:00 a.m.

Delta Air Lines Administration Offices
1030 Delta Boulevard
Atlanta, Georgia

Marcia W. Welch, CCR-A-172

BROWN REPORTING, INC.
1740 PEACHTREE STREET
ATLANTA, GEORGIA 30309
(404) 876-8979

* * *

[p. 32] flying at optimum safety?

A. My professional opinion, yes.

Q. Yes, they were not?

A. That's correct.

Q. And Delta also had, at that time, in 1991, at least in March-April of 1991, a rule that prohibited second officers from flying beyond age 60?

A. Yes.

Q. Okay. And that rule also was changed, was it not?

A. Through a court case, is the right terminology, yes.

Q. Okay. And whatever the impetus, there came a time when Delta permitted second officers to fly beyond age 60; is that accurate?

A. Yes, sir.

Q. And can you please tell me the date, as close as you can get it, to when that occurred?

A. I'll try. 1991, someplace; first, second quarter of 1991.

Q. The first or second quarter of 1991? Let's see if we can zero in on the date a little better.

When did Delta actually acquire Pan Am [p. 33] and for purposes of Pan Am, I mean the acquisition involved in this case; do you recall?

A. There were two dates. I think we took over the shuttle on one date, which I believe was September; but I think the official date was in November of '91.

Q. Okay. Now, at the time that the acquisition was completed, the deal was done, was Delta permitting second officers to continue employment in the cockpit past age 60?

A. I believe they were, but I'm not absolutely sure.

Q. You, in 1991, were also opposed, were you not, to a system that would permit second officers to continue in the cockpit past age 60?

MR. BOICE: Let me have the question back again. Did you say just in 1991?

Q. (By Mr. Norton) In 1991, you were opposed, were you not, to a system that would permit second officers to fly past age 60?

MR. BOICE: Objection, vague as to time.

THE WITNESS: I don't know how you could conclude I was opposed to it.

Q. (By Mr. Norton) Well, I'm asking you, [p. 34] sir?

A. Restate the question, please?

Q. Okay. In 1991, the entire year, calendar year, were you, throughout that year, opposed to a system in Delta that would permit second officers to fly past age 60?

A. I think a better characterization of that might be that I felt that the highest levels of safety would not be attained, if we allowed a second officer to serve past that age.

Q. I trust in your role that you wanted Delta to fly with the highest level of safety, true?

A. Of course.

Q. Then you were opposed to second officers flying past age 60; were you not?

MR. BOICE: Objection, vague.

THE WITNESS: I had concern about that issue.

Q. (By Mr. Norton) Were you against it? Did you disagree with it?

MR. BOICE: Object, compound.

Q. (By Mr. Norton) Did you disagree – let me make it real easy for you. A court ordered you to permit – ordered Delta to permit second officers to fly past age 60; is that true?

[p. 35] A. Yes.

Q. Did you agree or disagree with the order of that court?

A. I upheld the Court's order.

Q. That wasn't my question, sir. Did you agree with that order or disagree with that order?

A. I upheld the Court's order. That's the only issue I had to look at, but I do have concern and would have continued to have concern over the Court's decision as it impacts the operation of my airline in the cockpit.

Q. Well, were you unhappy with that decision?

A. Yes.

Q. So, here today, Delta permits both two-step-downs and second officers to fly past the age of 60, correct?

A. Yes.

Q. Would it be fair to say, sir, that after Delta was forced by the Court order to permit second officers to

remain in the cockpit past age 60, that Delta, at that time, in your view, was not flying at its – at the optimum levels of safety attainable?

A. In my judgment, in my professional judgment, I would have preferred that we not have

* * *

[p. 46] possible, the highest degree of safety possible consistent with the control they have. I would say no, they are not, in my view."

Are those yours words?

A. I don't know. You tell me. I don't –

Q. No, sir, I am not telling you anything I can't tell you anything. I am asking you if those are your words?

A. I don't know. I don't recall.

Q. Well, were those your feelings back in March of 1991? Did you believe that when those guys were in the cockpit over age 60, that you were not "flying at the highest levels of safety possible"?

A. In my view, there was some diminished margin to reach the highest levels of safety possible, yes.

Q. The answer is yes, right? They were not flying at the highest levels?

MR. BOICE: He answered the question yes.

Q. (By Mr. Norton) Now, are you aware, sir, that in 1984, the Federal aviation administration, FAA, did a year-and-a-half-long study and came to the conclusion that there was no reason to restrict [p. 47] second officers after the age 60?

MR. BOICE: Objection, assumes facts not in evidence.

Q. (By Mr. Norton) I'm asking you if you know that?

A. I don't at this particular moment. I may have at one time.

Q. Let me ask you if you can recall this question and answer. March 26th, 1991, "But is it a fair statement that the FAA determined, after a year-and-a-half more study, that the data was insufficient to propose and implement an age limitation for position of flight engineer?"

A. "Answer: At that point in time, they did conclude that, yes."

"And you knew that at the time?"

"Yes."

Do you recall that now? Does it jog your memory?

A. Not really, but I will accept it.

Q. Okay. Sir, back in 1991, when Delta was considering the Pan Am acquisition, can you name me a single airline in the United States of America that prohibited second officers from working past age 60 other than Delta Air Lines?

* * *

[p. 79] discussion and I can't really drill it down to that level of detail. I'm sorry.

Q. I would like to pass you what is a composite exhibit which is labeled as Plaintiffs' 100.

MR. BOICE: Do you have another copy? Thanks.

Q. (By Mr. Norton) Do you recognize the handwriting on that first page?

A. Yes, sir, I do.

Q. Okay. Is that your handwriting?

A. Some people would call it handwriting, but that's my scribbling, yes, sir.

Q. Okay. And this scribbling was done around April of 1991; is that accurate?

A. I don't see a reference to date, but it would probably have been in the spring of '91, yes.

Q. Well, these notes that you have here are – did you take these handwritten notes which appear on Pages 07001 through 003 as a result of a meeting with Mr. Affourtit?

A. I believe so, yes, sir.

Q. And at the top of that document, there's a reference to facility/aircraft/ what is that? Cockpit?

* * *

[p. 81] A. Yes, sir.

Q. What are those two unions?

A. The Air Line Pilots Association and the Flight Engineers International Association.

Q. All right. And the Flight Engineers Association, obviously, represented the flight engineers; is that correct?

A. Yes, sir.

Q. And if you will follow down a little bit, it says 40-plus professional engineers – 140, I'm sorry, 140 plus professional engineers with no prior upgrade rights; is that correct?

A. That's what it says, yes.

Q. Or is that no pilot upgrade rights?

A. Pilots.

Q. That's the professional engineer group. Look at the next line. Tell me what that says.

A. Over 60 including 72-year-old second officer as a two-step-down bid former captains.

Q. So what that says, does it not, sir, what that says is that over 60 of these 140 professional engineers are captains who did two-step-downs, correct?

A. No. I don't think it says that.

Q. You don't think it says that?

* * *

[p. 84] concerned of the aging process, certainly it includes an individual who would be 72 operating in the cockpit, yes.

Q. (By Mr. Norton) Down at the bottom of that first page, it says: "Lastly, less than half will retire in the next five years. Most hiring done in '64, '65, and '66."

Is that accurate? Is that accurate to what it says, not is the information accurate? Thank you.

A. Yes. I think it says lastly, less than half who retire in next five years and most hiring done in '64, '5, and '6, yes, sir.

Q. And then up in the left-hand margin, up at the top of the page, again, it says – what does it say there? Approximately one-half? Can you read that?

A. "Approximately one-half retire next five years, something, something, '64, '65, '66, three list F" – I don't know what that says. I really did a bad job there. I can't read the rest of that.

Q. It's okay. That's fine.

A. Oh, no, no. I know. "Pan American National FE" is what that says.

Q. Referring to the National Airlines?

* * *

[p. 86] labor strike on the seniority merger process is real," is what it says.

Q. That last sentence says: "Original bad apples have long" – "after original long, bad apples have long since retired"?

A. Where is that again?

Q. I'm sorry. It's – look at the second-to-the-last line where it's underlined, "long-term potential"?

A. Yes.

Q. Help me with the rest of that.

A. Again, I prefer to read the whole thing because I don't think I can just pull out a sentence and answer a question. Do you mind reading the whole paragraph?

Q. No, sir. I'm asking you to read starting at "long-term potential, put here after the original bad apples have long since retired."

A. Well, again, I don't know if that's a whole sentence or a piece of a sentence.

Q. Sir, I don't care if it is a phrase. All I'm asking you to do is starting with "long-term," please read what your handwriting states.

A. In the middle of the sentence begins "long-term potential, probably here," after the [p. 87] slash "bad apples have long since retired?"

Q. Well, it's original. Isn't that that word out there?

A. It's crossed out. I don't know.

Q. What does the word look like? It's your handwriting?

A. Could be origin. I don't know what it says.

Q. "After the origin bad apples"?

A. I don't know. It's crossed out.

Q. Are you prepared to testify here today, sir, that Mr. Affourtit used the term "bad apples" to you?

A. I am.

Q. You're positive of that?

A. I am.

Q. Did you ever consider negotiating with the Pan Am ALPA MEC or with the FEIU or FEIA over the integration of the seniority list with Delta?

A. No, sir.

Q. The answer is no?

A. Correct. The answer is no.

Q. And you did not negotiate with either?

A. That's correct.

Q. Nor did anyone else from Delta, I

* * *

[p. 94] He came out of the Air Line Pilots Association as an officer. He was affording me the opportunity to get inside their head because he wanted to see this thing go through.

Q. But yet you never consulted with him whatsoever when you did the methodology for commingling the seniority, did you?

A. That's correct.

Q. He had all that experience, been a prior ALPA officer, had the best interests of the Pan Am people at heart, and you didn't even talk to him about it when you were doing the methodology?

MR. HERMAN: Objection to form.

MR. BOICE: Same here.

THE WITNESS: I respectfully had gleaned enough information from him to know what the issues

were and I had the interest of the Pan American pilots as well.

Q. (By Mr. Norton) Okay. Let's go to 007. "Dirty deal." Those are your words, aren't they, sir?

A. No.

Q. You're telling me those are Mr. Affourtit's words?

A. Yes, sir.

* * *

[p. 104] us on how to make sure we retain profitability. He was obviously losing a great deal of money, had lost a great deal of money, was bankrupt. This was his professional opinion on how you could turn it around.

Q. All right. Thank you. Now, if you would be kind enough to turn to Page 009. Now, this is a typed page. Who typed that up, do you know?

A. No, sir.

Q. You don't?

A. No.

Q. Well, it wasn't typed up by your secretary or from your notes?

A. Not necessarily, no, not at all.

Q. Well, is this supposed to be a typed version of some handwritten notes that you made?

A. It could well be. I don't have any document that suggests – oh, next page.

Q. The word – under – over there, it says, "personnel contaminated workplace, especially since 1987." Are you prepared to testify that Mr. Affourtit used the word "contaminated" with respect to the work force at Pan Am?

A. I have no point of reference other than to suggest that he did.

* * *

[p. 107] Q. Okay. I mischaracterized it, sir, by quoting Delta's words from Delta's document which says contaminated work force especially since 1987?

MR. BOICE: That's not how you mischaracterized it.

Q. (By Mr. Norton) Now, I'm asking you, sir, is contaminated your word?

MR. BOICE: Asked and answered.

Q. (By Mr. Norton) Answer the question.

A. It may have been.

Q. Thank you.

A. As it applies to new hires.

Q. I don't care who it applies to. Contaminated is your word. You know what contaminated means, don't you?

A. Yes.

Q. Next, "Does not meet Delta Standards." You're telling me Mr. Affourtit is talking to you and telling you

their work force doesn't meet your standards; is that correct?

A. No. That could have been an extension of the first sentence.

Q. The reason it didn't meet your standards is because if you go on down there, it says 68 over

* * *

[p. 120] of the prior note that you took?

A. Yes.

Q. I would like to ask you one question. With respect to the contaminated work force, are you aware of the employees that Pan Am hired – let me start over and do this a little easier.

Are you aware that once Pan Am started to hire in 1987, that the majority of the pilots, flight engineers, that they hired were furloughees and most of them were furloughees going back from the 1960s?

A. I was aware that there was a block of furloughees that were recalled subsequent to 1987. yes.

Q. Were you aware they were, in fact, people that had been furloughed back many, many years ago?

A. I didn't remember that, but I knew it had been a long time.

Q. So you knew that, I trust, they were people that would be fairly old in age?

A. No, I –

Q. Fairly up in years?

A. Again, I didn't concentrate on that. That was not a point of reference to me.

Q. Were you aware that Pan Am went for about [p. 121] 20 years without hiring any new pilots?

A. No. As a matter of fact, I think this is the first time I have heard that. I'm surprised. It's a shame.

Q. When you talk about the contaminated work force since 1987, you testified earlier that related, to new hires. Did that relate to the new hires and the return of the furloughees?

A. Again, I would like to put this in the context where we can get to a core issue. The reference was, again, to who they were hiring as new hires in '87 and, again, Dan's frustration, inability, because of the uncertainty or whatever, whatever other adjective you have with Pan American, they would not have met the Delta Air Lines standards for hiring.

Q. Okay. On this document, right out beside contaminated since 1987, even above it and below it, are references to 68, over age 64, over age 70, I guess. Do you see that?

A. Yes.

Q. Okay. Are you certain that those comments aren't part of the same thought process relating to the contaminated work force?

A. Not only am I certain, I'm absolutely [p. 122] positive. I testified to that several times.

Q. You just happened to put those references up there but –

A. Especially since 1987, it says. No one age 70 has been hired since 1987, more than likely. Again, I just must emphasize that's what I was referring to.

Q. Of course, the words especially since 1970, would, of course, suggest that it was to some degree contaminated even prior to that?

MR. BOICE: I think it was 1987. You said 1970.

Q. (By Mr. Norton) Than you, Counselor. Would you agree with that?

A. Within the context that I thought I heard that there were other times when they weren't able to secure the level of the pilots that they had hoped, yes.

Q. It says "pay off the professional flight engineers" down there, about the third line down. Do you see that?

A. Yes.

Q. Is that Mr. Affourtit's suggestion to you that you, Delta Air Lines, pay off the professional flight engineers?

* * *

[p. 124] A. Terminology?

Q. Well, modified-status ratio is a name of a methodology?

A. Right.

Q. Who came up with the notion that we – it would be called modified status ratio? Was that the company that did that? Was that Delta MEC? Who was it?

A. ALPA in general terms, and I guess the Delta MEC as you refer to them.

Q. So that was a name that ALPA came up with?

A. As far as I know. We would have no reason to call it something.

Q. Now, in this modified status ratio method of integrating these seniority lists, there were approximately 500 slots that were ghost positions, isn't that – isn't that the term that's been generally used to describe positions in which no person was currently employed?

A. I have never heard that term before until just now.

Q. Let me try it again. Forgetting the ghost position terminology, in the slotting process that was utilized, there were 500 slots, at the time [p. 125] the slotting was done, in which there was no active employee; is that true?

MR. BOICE: Objection, vague.

THE WITNESS: I believe so.

Q. (By Mr. Norton) Your answer was I believe so?

MR. BOICE: I really don't know what you're talking about.

MR. NORTON: But the witness does, Counselor.

MR. BOICE: That's fine.

THE WITNESS: If I understand your question, my response was there were slots – there were positions on the integrated seniority list to which no pilot's name was assigned. Is that your question?

Q. (By Mr. Norton) There was no person? Nobody had been hired yet?

A. Precisely.

Q. Precisely. That was my question. So that the people coming over from Pan Am were slotted into an integration system in which there were hundreds of slots where there really was no employee employed by Delta at the time the slotting was done?

A. Some may and some weren't.

FLT OPNS

Update Personnel: Contaminated Workforce esp since 87

not meet DL Standards
68 > age 60
4 > age 70
26 double bid down
50% retire 2001
not 1995 -

+B727
Non standard ___

(92 + 13)

Operating Plan today req ___ pilots

Based on 40% credit solution in FRA

100% in South America due to frequency

Politics

PAA ALPA//IAFE Strategy

1. Long fences on aircraft and routes with Delta paycheck
2. Arbitration to DOH
3. 1st ROH (right of hire) for excess or furlough

Delta Strategy – Prenuptial (?)

Integration method & list part of agreement with PAA to include: (no active face – face DL/PAA ALPA

Merge Both Lists

Extension on present contract w/ no strike clause

List integrated or status or ration not DOH

(fence aircraft not route)

1 year to reshuffle and put seniority into stovepipe (probably 600+ pilots)

Snapshot of list integration 1 year from deal

Furloughees granted 1st right of *interview*

Strategy

* Work *125* or *1250* pilots available

507
77
32

616
181

797
Don (C or G) p. 199

[Alger did not interpret the handwritten notes on this page in his deposition (with the exception of the notes in the lower left hand corner). The rest of the transcript was created by counsel interpreting the handwriting in conjunction with the testimony at pgs. 173-198 regarding pgs. 7009 and 7014 which is a typed version of the notes created by Alger's office.]

Dirty Deal

Last 20 years drawing garbage

+ ancient airplanes

+Delta employee perception cost to do deal to parity (Delta folks no pay raise

Prenuptial agreement

3 year fence to work and train

1st Right of Interview??

Buy assets that don't require personnel ie shuttle

??*Temporary Route Authority*

Retirement _____ Burden

Frankfurt base not economically feasible. L10 fly.

REDACTED

RAM TELCON NOTES RE RCA/PAN AM MANAGEMENT PILOT CONTACTS OF MAY 2, 1991

CONFIDENTIAL

- HCA impressed with pilot management people.
- Simulator facility well designed.
- Simulator facility accrued over $6,000,000 in net revenue through lease time to other OALs.
- Thirty Six [sic] Street is the bedrock for all Latin American aviation.
- Simulators are of 1971 vintage: however, they are well maintained – visual systems far better than our own of that era.
- Simulators: A-300, A-310 and 747 (HCA did not mention 727 but believe they have 727 Sims as well).
- HCA likes philosophy of training.
- Opportunity for consolidation of Delta Flight Training/Pan Am Flight Training good.
- Aircraft cockpits include Sperry with dual Q flight directors.

- 727 Fleet is a hodgepodge of everything – aircraft leased from all over the world; have many different configurations.
- Pan Am operates 727 fleet with a "Gold Book" which is used by pilots for standardization/transition from aircraft to aircraft.
- A-300 is considered to be the "work horse" of the fleet; however, the A-310 is well respected.
- A-310 is a two-man cockpit and is reasonably high tech as opposed to the A-300.
- People side: Three-man cockpit aircraft are flown with two unions, i.e., ALPA and a Flight Engineers Union. Pan Am has 140 *professional* engineers. There are three other unions – International Union of Flight Attendants; TWO (simulator maintenance and engineering dispatchers [51]); and IBT (mechanics).
- Pan Am is burdened with a two-step bid down system and has several "aged" flight engineers, some in their 70s and one in particular, age 72 plus (born in 1919).
- Some of their pilots are assigned to Al Nippon Airways (Pan Am is paid a "finder's fee," pilots are paid Pan Am salary plus 25%, plus a bonus at the end of the three-year assignment.
- Pan Am Express pilots are on the Pan Am seniority list.
- Pan Am has five or six pilot bases throughout the world but is in the process of consolidating to Miami and New York City. (Berlin, for example, is still a domicile.)
- They have some pilot personnel problems but nothing out of the ordinary, except they have one case where they terminated a captain who permitted a flight

attendant to "fly" the airplane from the left seat, aircraft incurred an altitude bust, cited by the FAA, etc. The arbitrator held in favor of the captain, so the case is still pending.

- On April 30, Pan Am furloughed 40 pilots and expects to furlough another 100 within the next 30 days with eight year recall rights.
- Pan Am would furlough faster except for the CRAF operation. They beg and borrow for opportunities to fly CRAF charters. The revenue from these charters appears to be critical.
- HCA feels that we would have to look at a minimum of a one-year plus fence, perhaps a fence for as long as two to three years, which, of course, would require agreement with Delta MEC.
- All MIA facility leases, including the simulator facility, are tied to a common expiration date (4/1/92). All leases are primary leases with the Miami Airport Authority.
- All of their aircraft appear to be leased. (HCA did not mention simulators, but suspect they are leased as well.)
- All flight instructors are PA first officers (called "training captains.")
- Maintenance coordination, flight dispatchers, meteorology, reroute, and perhaps et al. are in one central location, ala Western's Operations Center in LAX.
- HCA confirms approximately one-half of seniority list pilots due to retire within five years.
- Saw nothing really negative!

* * *

[p. 1] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ERICH H. ADAMS, et al. Plaintiffs, vs. DELTA AIR LINES, INC., Defendant.	)	CIVIL ACTION FILE NO. 96-2871

VIDEOTAPE

DEPOSITION OF

WILLIAM SPALDING

April 29, 1997

12:56 p.m.

1030 Delta Boulevard
Atlanta, Georgia

Penny J. McPherson, CCR-B-914, RPR

BROWN REPORTING, INC.
1740 PEACHTREE STREET, N.W.
ATLANTA, GEORGIA, 30309-2335
(404) 876-8979

* * *

[p. 26] opportunity to have a job interview at Delta?

A. That's correct, because of his seniority.

Q. And at that point it would be up to him to assess whether he wanted to do that and to know whether he was current and qualified on the equipment; and if those things were positive, he would put in – that airman would put into effect an attempt to get an interview at Delta?

A. Yes, that would be true.

Q. And if Harry Alger did not want this second officer named Nyilas hired, how could he put that into effect by telling you?

A. As I say, I don't know right now what – where these notes came from, what the meeting was or the information that was being relayed at that point.

Q. Well, sir, what else in the whole world could it mean, an entry on this piece of paper in your handwriting that says Nyilas second – 727 second officer, dash, Harry Alger, no hire with the word "no" underlined?

MR. HUDSON: Objection as to the form. Calls for speculation.

THE WITNESS: Again, right now other than exactly what it says there, I don't have [p. 27] any recollection what that means.

Q. (by Mr. Sherouse) Okay. Well, let's assume that it means basically what it says in English, and let me ask you the following questions about that. If Harry Alger didn't want Nyilas hired, how could he accomplish that by telling you?

A. Again, it wouldn't have any – for me I wouldn't be the one that would advise him that he wasn't going to be hired. That would have to come from somebody else.

Q. Could it be that the purpose in telling you was so that Nyilas would never get a call from Delta stating that he was eligible to have an interview?

MR. HUDSON: Objection as to the form.

THE WITNESS: I –

MR. HUDSON: Calls for speculation.

THE WITNESS: I really couldn't tell you right now because –

Q. (By Mr. Sherouse) It's – it is true that's the only thing you had control over; if Alger didn't want him hired, the only thing you could do is make sure he didn't get that first telephone call, correct?

A. As far as I know we weren't – at the [p. 28] time we were calling, nobody up front was – we were not told that anybody skip him on the list because he isn't going to be hired.

Q. But you do have this note in your own handwriting dated September 30th, 1991 that has the word "no hire" next to Nyilas' name, correct?

A. That's what it says in the note, yes.

Q. And you have no reason to believe this information originated with anybody other than Harry Alger, correct?

A. Based on the format of it, I would assume that is correct, yes.

Q. that this no hire information came from Harry Alger, that's correct?

A. Again, since I don't recall what I was doing at the time these notes were put together, I really couldn't say.

Q. I'd like to show you some documents and have you take a look at them first. This first one I've got I've

only got one copy of. So I'll pass it to your attorney first, but what it's going to be is Supplemental Agreement between Delta Air Lines and the Air Line Pilots in the Service of Delta, what we were talking about earlier, and this particular copy is marked Exhibit 57A.

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* * *

✓(2) Nyilas 727 S/0 – HCL No Hire

* * *

CONFIDENTIAL

[p. 1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ERICH H. ADAMS, et al.,

Plaintiffs,

96 CIV 2871 (HB) v.

DELTA AIR LINES, INC.,

Defendant.

----------x

September 25, 1997
12:00 p.m.

Before:

HON. HAROLD BAER, JR.,

District Judge

APPEARANCES

ANDERSON, MOSS, SHEROUSE & PETROS
BY: THOMAS M. SHEROUSE
and

HOGG, ALLEN, NORTON & BLUE
BY: ROBERT L. NORTON
Attorneys for Plaintiffs

KILPATRICK & CODY
Attorneys for Defendant

BY: WILLIAM H. BOICE

COHEN, WEISS and SIMON
Attorneys for Air Line Pilots Assoc.

BY: PETER HERMAN

* * *

[p. 10] employer's concern about the economic considerations of an employment decision has nothing to do with ADA violations.

MR. NORTON: Your Honor, there is no economic consideration here. They hired our people. That's not an economic issue.

THE COURT: I understand they hired them. But your concern, in part, especially the way you talk about these 500, these phantoms, it turns out, it seems to me that that isn't a phantom operation in terms of bias. That's a phantom operation in terms of who they have to pay.

MR. NORTON: No, sir.

THE COURT: No, sir, your Honor. All that did is push our people, when they jerked them back out on November 1, to the bottom.

Let me ask you this, your Honor. If you don't think that we have established that Mr. Alger set out in a devious direct way, explain this – I'm not asking you to explain this. I apologize. If you will look at our exhibits, he specifically, this almighty vice president over this huge operation, specifically directed, "Don't hire Nyilas. Don't hire Nyilas." Do you know who he was? Our oldest second officer.

Now here we got the vice president of the company in the middle of a huge $4 million transaction, picking out one little guy that happens to be the oldest guy and [p. 11] instructing them not to hire him, until the legal department came in and changed it. That is age adversity,

your Honor. That is the kind of evidence that goes together to show that the changes he made at the last minute to Section 20 of that supplemental collective bargaining agreement could only have been made for that reason.

They will tell you in their brief that the logical things in an airline merger is the captains are first, the first officers second, and the second officers third. They ramble along. They had negotiated a collective bargaining agreement that went through four or five sessions that said it would be by date of birth, directly contrary to what they claim their business reason is. And at the last minute, when it was obvious Pan Am was not going to put one list together, they snuck in there and slam-dunked our people, your Honor. And it is the kind of question that has to be resolved by jury.

Please let me just read you one thing, because the Second Circuit has a lot more about our case than it does about theirs. As recently recognized by the Second Circuit. "Employment discrimination is often accomplished by discrete manipulation, hidden under a veil of self-declared innocence." Delta in a nutshell. "A victim of discrimination is unlikely to produce direct evidence of discrimination or smoking gun," although we have, "and, [p. 12] therefore, usually must rely upon cumulative weight of circumstantial evidence. Accordingly, where the defendant's intent and state of mind are placed at issue, summary judgment is ordinarily inappropriate."

There are so many facts in dispute in this case, I don't see how, where the two primary actors are confessed, admitted stereotypical age-adverse individuals, that the

court can possibly say we can't prove our case. I mean, the standards for granting summary judgment are well-known to this court. I mean, to me, short of having a confession, I can't even imagine what more we could lay in front of this court.

THE COURT: Let me hear from your adversary. Maybe they will enlighten you, since I'm not sure I can very well. You heard what he had to say.

MR. BOICE: I heard.

THE COURT: Let's be sure you respond to his concerns. If I have some, I promise not to be bashful.

MR. BOICE: I understand, your Honor. I know your Honor is not bashful, but let me address his concerns directly. What he argues is that Mr. Alger, Captain Alger, is age-adverse because he was concerned about the court's order with regard to over-age-60 second officers. And here's what the record is, your Honor.

The FAA has a rule called the Age 60 Rule which [p. 13] prohibits a captain or a first officer from flying past age 60. For a number of years, in fact, throughout its career, Delta has only hired pilots for all three cockpit positions, that is, for the flight engineer position, for co-pilot and captain. The FAA rule applies to captains and co-pilots. Delta applied that same rule to flight engineers because the reason behind the FAA rule is safety; that is, there are detriments with the aging process. That's why the FAA today has that rule for captains and co-pilots.

Delta applied the same rule for flight engineers because it is a safety position, also. That policy, your Honor, was defended by Delta in lawsuits as late as 1984,

successfully, and upheld in a decision by the Ninth Circuit Court of Appeals. It was challenged again in a lawsuit in 1991 for one second officer who was over age 60, and the jury found that the company could not require him to retire at age 60; that the Age 60 Rule of the FAA did not apply. The company immediately changed its policy and allowed second officers to be hired after or continue to fly after age 60.

Captain Alger testified that caused him concern, because the basis for the company's policy was safety. If the FAA rule permits safety by being applied to captains and co-pilots, it's safer to have flight engineers who are also in safety-sensitive positions do the same thing. However –

[p. 14] THE COURT: If I understand it, all we are talking about here these days seems to be motivation. He has now pointed – not that you haven't, and I haven't seen it before – to a variety of commentaries from your captain that suggests fairly significant kinds of biased statements with respect to age.

MR. BOICE: The proof is in the pudding, your Honor. What he says is the court ordered us to do it and I accept the court's order. We will hire people over age 60. And what is the proof? We hired flight engineers from Pan Am over age 60, including a flight engineer up to age 72. The Nyilas that he said, the note says from Captain Alger, "Don't hire." The company instead, in fact, hired.

Your Honor, if I might, because we really have been mischaracterized as far as this motive, if I may put that in context. The comments that the Second Circuit reviewed in the *Criley* case are notes that Captain Alger took from

conversations he had with the vice president of flight operations at Pan Am. Captain Alger was vice president of flight operations at Delta.

In May, when Delta was considering these assets, he went on an investigatory mission to talk with the vice president of flight operations at Pan Am. The vice president of flight operations at Pan Am has testified – and this is in the record and it's undisputed – that he

* * *

[p. 853] UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE A. WALLACE TASHIMA,
JUDGE PRESIDING

JOHN H. BAKER, et al.

Plaintiffs,

and

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, CV 89-0517-AWT

Plaintiff-Intervenor,

vs.

DELTA AIR LINES, INC., COPY

Defendant.

VOLUME V

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
TUESDAY, MARCH 26, 1991

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* * *

[p. 1043] Q Well, what is that? Would you explain what the relationship is?

A Well, gee, I think it's pretty straightforward. The FAA had said that – I guess what my quagmire is that how do we allow, knowing what we know about the aging process, any crew member, in this case the second officer, to fly beyond 60. Which we know about the aging process performance degradation that goes along with it happens, performance is going to decline with age.

We also know that with the aging process the risk of incapacitation, whether it be acute or subtle, increases with age, and more exposure, more risk with that. And undermining and holding all of that up is the uncertainty that there is no protocol; there is no indicator; there is no predicator of who does age when, how fast the person ages or when, who or the rate or when that person is going to reach that point where you can no longer perform. There is no system in place that can define or identify or distinguish those people.

FAA has in their wisdom –, and I believe it's a very sound policy – established that as a criteria for pilots and first officers. We don't differ with the FAA at all but also encompassing the flight engineer as second officer because the FAA has set that as a minimum standard with the pilot and the copilot.

Supreme Court, U.S.
FILED
AUG 27 1999
OFFICE OF THE CLERK

No. 99-188

IN THE

Supreme Court of the United States

ERICH H. ADAMS, *et al.*,

Petitioners,

v.

DELTA AIR LINES, INC. and
AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DELTA AIR LINES, INC.

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QUESTION PRESENTED

Did the Second Circuit Court of Appeals properly affirm the district court's summary judgment dismissing Petitioners' age discrimination claims against Respondent Delta Air Lines, Inc. ("Delta") under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.* (the "ADEA"), where the conduct complained of was Delta's agreement with the Delta pilots' union to use Petitioners' flight engineer seniority at Pan American World Airways, Inc. ("Pan Am") to determine the order in which Petitioners were placed into the flight engineer slots created on the Delta pilots' seniority list for Pan Am cockpit personnel hired by Delta rather than attempting to re-order the relative seniority rankings of Pan Am cockpit personnel in a manner that Petitioners claim would have been more favorable to them?

STATEMENT PURSUANT TO RULE 29.6

Delta has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioners, plaintiffs and appellants below, are 71 former Pan Am flight engineers who were hired by Delta in 1991 in connection with Delta's purchase of certain Pan Am assets. During the time period in question, their ages ranged from 29 to 71. Petitioners alleged that Respondent Delta, defendant and appellee below, discriminated against them on the basis of their ages by agreeing with the union that represents Delta's pilots on a seniority integration methodology pursuant to which they were offered positions on the Delta pilots' seniority list that gave them less relative bidding seniority than they wanted.

Petitioners were offered slots on the Delta pilots' seniority list on the basis of a seniority integration methodology that was negotiated between Delta and the union that represents Delta's pilots, the Air Line Pilots Association International ("ALPA"), and was set forth in a supplemental collective bargaining agreement. Absent such a supplemental collective bargaining agreement — in which the existing Delta pilots relinquished some of their contractually protected relative bidding seniority, Delta would have been contractually obligated under the existing collective bargaining agreement to place all of the Pan Am cockpit personnel hired by Delta, including Petitioners, on the bottom of the Delta pilots' seniority list.

It is undisputed that, at all times relevant to the seniority integration, Delta and ALPA had agreed to use Pan Am seniority rankings, if Pan Am provided them, for the purpose of both hiring Pan Am cockpit personnel and placing them on the Delta pilots' seniority list. It is undisputed that Pan Am provided seniority rankings for pilots (Captains and First Officers) on one list and flight engineers on another list. It is further undisputed that the Pan Am pilots' seniority list

was used to hire Pan Am pilots and to fill the slots created for them on the Delta list, and the Pan Am flight engineers' seniority list was used to hire Pan Am flight engineers and to fill the slots created for them on the Delta list. Petitioners alleged in this case that Delta committed age discrimination by not re-ordering or combining the two separate Pan Am lists before filling the slots created for the Pan Am cockpit personnel on the Delta pilots' seniority list.

The district court judge granted Delta's motion for summary judgment dismissing Petitioners' age discrimination claims. *Adams v. Delta Air Lines, Inc.*, 1997 WL 620823 (S.D.N.Y. Oct. 8, 1997). The district court held that even if Delta's then-Vice President of Flight Operations harbored "age bias," as Petitioners alleged, there was no link or connection between such bias and any adverse action against them on the basis of their ages. *Id.* at 620823, at *4. The Second Circuit unanimously affirmed in an unpublished opinion. 175 F.3d 1007 (2d Cir. 1999) (*per curiam)*; Petitioners' Appendix, 1-5.

The Court should deny Petitioners' request for a writ of certiorari not merely because the Second Circuit's decision was correct, but also because no legal issue worthy of the Court's certiorari review is presented by the Petition. The entire Petition is based upon the erroneous and unsupported assertion that there is a conflict between the Second Circuit's decision in the case and decisions of other United States Courts of Appeals. According to Petitioners, the Second Circuit held that "direct evidence of discriminatory animus on the part of a primary decision-maker" is "insufficient to raise an inference of discriminatory motive" (Pet. 12; *see also*, *id.* at i, 6-7, 10-12, 17-18), and this holding conflicts with decisions of other United States Courts of Appeals. *Id.* at 13-18.

The Second Circuit, however, held no such thing. The Second Circuit merely affirmed the district court's summary judgment after applying well-established law concerning burdens of proof in employment discrimination cases and concluding that there was no evidence of discriminatory conduct by Delta. There is no conflict between the Second Circuit's decision in this case and decisions of the other United States Courts of Appeals cited in the Petition, nor is the "Question Presented for Review" (Pet. i) actually presented by the Petition.

STATEMENT OF THE CASE

A. Factual Background

Petitioners' "Statement of Material Facts" (Pet. 2-10) is incomplete, and the factual assertions in their Petition are a significant distortion of the record evidence. A more complete statement of the undisputed facts relevant to the Petition is set forth below.

1. *The Asset Purchase Agreement Between Delta and Pan Am*

In January 1991, Pan Am filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. In July 1991, Pan Am and Delta entered into an Asset Purchase Agreement (the "APA"), dated July 27, 1991. Pursuant to the APA, Delta agreed to acquire certain equipment, route authority, and other assets from Pan Am. The equipment that Delta agreed to acquire in connection with the transaction included Airbus A-310 and Boeing B-727 commercial aircraft. APA, ¶¶ 2.1(b) and 2.2(b). The APA was approved by the United States Bankruptcy Court for the Southern District of New York on August 12, 1991. *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 447 (S.D.N.Y. 1994).

The APA provided that Delta would hire at least 6,600 Pan Am employees, including 700 Pan Am cockpit personnel, the approximate number required to operate the aircraft that Delta had agreed to acquire. APA, ¶¶ 5.9(a), (h). The APA obligated Pan Am to "provide to [Delta] a list of all employees in order of seniority and by . . . classification" (*id.*, ¶ 5.9(a)), and it required Delta to offer employment to the Pan Am pilots (Captains and First Officers) and flight engineers[1] "in seniority order by category." *Id.*, ¶ 5.9(h). The APA also provided that Delta could not offer employment to Pan Am's pilots and flight engineers unless and until Delta had reached an agreement with existing Delta pilots on the terms and conditions of employment that Delta would offer, including the methodology for placing the Pan Am pilots and flight engineers on the Delta pilots' bidding seniority list. *Id.*, ¶ 6.11.

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1. One of the two types of aircraft that Delta acquired in connection with the transaction, the B-727, requires a three-person cockpit crew, consisting of a Captain, a First Officer, and a flight engineer (Delta calls the person who occupies this position a "Second Officer"). The division of responsibility between these three cockpit crewmembers has been described as follows:

> The "captain" is the pilot and controls the aircraft. He is responsible for all phases of its operation. The "first officer" is the copilot and assists the captain. The "flight engineer" usually monitors a side-facing instrument panel.

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 114 (1985).

2. *Creating Slots for Pan Am Pilots and Flight Engineers on the Delta Pilots' Seniority List*

Absent an agreement with the existing Delta pilots to create positions for the Pan Am pilots and flight engineers on the Delta pilots' seniority list, the collective bargaining agreement between Delta and the Delta pilots' union (ALPA) required that all of the Pan Am cockpit personnel hired by Delta be placed at the *bottom* of the pilot seniority list (like all new-hire pilots), *below all existing Delta pilots*. On August 30, 1991, Delta and ALPA agreed on a "modified status ratio methodology" that created slots for the Pan Am cockpit personnel on the Delta pilots' seniority list. The slots were spread throughout the Delta pilots' seniority list and generally corresponded to the cockpit jobs being created at Delta in connection with the asset acquisition.[2] This methodology was set forth in a supplemental collective bargaining agreement between Delta and ALPA.

3. *Delta's Hiring of Pan Am Pilots and Flight Engineers*

In the Asset Purchase Agreement with Pan Am, Delta agreed to offer employment, "in seniority order by category" as determined by Pan Am, to Pan Am pilots and flight

---

2. The "modified status ratio methodology" agreed to by Delta and ALPA created ratioed slots for the Pan Am Captains beginning with the positions held by Delta Captains on similar aircraft on the Delta pilots' seniority list and ratioed slots for Pan Am First Officers and flight engineers among the remaining number of pilot positions that were projected to be existing at Delta as of December 31, 1992. The agreed upon methodology used the number of Delta pilot positions anticipated (before the Pan Am acquisition) as of December 31, 1992 to give recognition to the Delta pilots' expectations of significant planned job growth in the airline.

engineers who were or would become "fully trained and currently qualified" on either of the two aircraft types that Delta was acquiring by the closing date, November 1, 1991. APA, ¶ 5.9(h)(i). Unlike at Delta, where ALPA represented all cockpit personnel, Pan Am cockpit personnel were represented by two unions and had two seniority lists. ALPA represented the Pan Am pilots (Captains and First Officers), and the Flight Engineers International Association ("FEIA") represented the Pan Am flight engineers. The Pan Am pilots' seniority list was used for awarding Captain and First Officer positions at Pan Am, and the Pan Am flight engineers' list was used for awarding flight engineer positions at Pan Am.

Pan Am had numerous "professional flight engineers" who were not eligible to occupy any other cockpit position. They held positions only on the Pan Am Flight Engineers' seniority list, not on the Pan Am pilots' seniority list. Since new-hire pilots at Pan Am also filled the flight engineer position, typically early in their careers, some pilots at Pan Am serving as flight engineers were on both the flight engineer and pilot seniority lists. However, since only the Pan Am flight engineers' seniority list contained all Pan Am flight engineers, that was the list used for flight engineer bidding at Pan Am.

Delta, in contrast, hired only pilots and had only one seniority list. The entry level position for pilots at Delta was the B-727 flight engineer (or "Second Officer") position, but all pilots were eligible to bid out of the flight engineer position once they had attained adequate seniority.

Pan Am provided Delta with lists of all eligible pilots (Captains and First Officers) ranked in seniority order according to the Pan Am pilots' seniority list. Likewise, Pan

Am provided Delta with a list of all eligible flight engineers ranked in seniority order according to the Pan Am flight engineers' seniority list.

Delta offered Second Officer (flight engineer) positions on the B-727s being acquired from Pan Am to qualified Pan Am flight engineers based on their rankings on the Pan Am flight engineers' seniority list. Many of the Petitioners were relatively senior flight engineers at Pan Am. When they learned that Delta would be offering employment to B-727 flight engineers, they used their Pan Am flight engineer seniority to bid down from their flight engineer positions on the more senior and higher paying B-747 or A-300 aircraft to the B-727 flight engineer position so that they could become eligible to be hired by Delta as B-727 Second Officers.

Thus, while the B-727 flight engineer or Second Officer position, as an entry level position for new-hire pilots, is typically staffed by the youngest pilots, the average age of Pan Am flight engineers hired by Delta was closer to that of the Pan Am pilots hired by Delta. The average age of the 690 Pan Am pilots (Captains and First Officers) hired by Delta was 50 (median age 52). Their ages spanned from 27 to 59 (a federal regulation prohibits any person from occupying a Captain or First Officer position after the age of 60).[3] The average age of the 84 Pan Am flight engineers hired by Delta (which includes the 71 Petitioners in this case) was 48 (median age 50). Their ages spanned from 71 to 29 (with six of the 84 flight engineers being over age 60).

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3. 14 C.F.R. § 121.383(c).

4. *Filling the Slots for Pan Am Pilots and Flight Engineers on the Delta Pilots' Seniority List*

Since the APA obligated Delta to hire the Pan Am cockpit personnel in seniority order as determined by Pan Am, Delta and ALPA entered into a supplemental collective bargaining agreement that likewise required Delta to use the seniority order provided by Pan Am for filling the slots created for the Pan Am cockpit personnel on the Delta pilots' seniority list. Pan Am provided separate seniority lists for pilots and flight engineers. In accordance with its agreement with ALPA, Delta used the Pan Am pilots' seniority list to fill the Captain and First Officer slots and the Pan Am flight engineers' list to fill the flight engineer slots. While some of the Petitioners (those who were not "professional flight engineers") also held seniority positions on the Pan Am pilots' seniority list, that list was not considered in filling the flight engineer slots on the Delta seniority list because Petitioners were not eligible for hire as Captains or First Officers but only as flight engineers, and only the Pan Am flight engineers' seniority list contained all Pan Am flight engineers.

The order in which the Pan Am pilots and flight engineers filled the slots created for them on the Delta pilots' seniority list (like the creation of the slots themselves) made little difference to Delta. If Pan Am and its two unions had created a single seniority list that included all Pan Am cockpit personnel, pilots and flight engineers, Delta would have used that list in filling the slots created for the Pan Am cockpit personnel on the Delta pilots' seniority list. However, Pan Am could not get its pilots and flight engineers to agree to a single seniority list for all Pan Am cockpit personnel. Delta thus used the two lists provided by Pan Am to determine the

order of both hiring and placing the Pan Am cockpit personnel on the Delta pilots' seniority list.

The APA did *not* "require[ ] Delta to give Pan Am cockpit personnel written notice . . . of the terms and conditions upon which offers of employment would be made," as Petitioners assert. Pet. 3; *see also id.* at 5 n.3. Instead, the APA actually stated that Delta "shall advise Sellers [*i.e.*, Pan Am] in writing of the material terms and conditions upon which offers of employment to the selected Sellers' employees will be made." APA, ¶ 5.9(c)(i)(B). Delta did that. The supplemental collective bargaining agreement between Delta and ALPA was signed on August 30, 1991, *before* any Pan Am cockpit personnel was offered employment or hired by Delta.

B. The District Court's Decision

In responding to Delta's summary judgment motion, Petitioners alleged that Delta discriminated against them on the basis of their ages by agreeing with ALPA to offer them positions on the Delta pilots' seniority list according to their seniority rankings on the Pan Am flight engineers' seniority list. Petitioners argued that Delta should have done what they had been unable to do at Pan Am — combine the two separate Pan Am seniority lists, by either date of hire at Pan Am or its predecessors or by date of birth, and then use that new Delta-created list to fill the slots created for the Pan Am cockpit personnel on the Delta seniority list. Petitioners argued that Delta's failure to combine Pan Am's two separate seniority lists was due to its "age bias" against the Pan Am flight engineers.

Lacking evidence of discriminatory treatment, Petitioners attempted to avoid summary judgment by arguing, based on certain handwritten notes taken out of context, that Captain Harry C. Alger, Delta's then-Vice President of Flight Operations, was allegedly "biased" against older airmen. Captain Alger was one of several Delta officers who approved, on behalf of the company, the final seniority integration methodology negotiated between Delta and ALPA. Those same notes, however, were found by the Second Circuit to be inadequate to defeat summary judgment in *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir.) (*per curiam*), *cert. denied*, 118 S. Ct. 626 (1997), which was an age discrimination claim filed by a purported class of Pan Am pilots who were 55 years of age and older and were *not* hired by Delta in connection with the 1991 asset acquisition. Petitioners' reliance on those notes in an attempt to show age discrimination made even less sense in this case because: (1) the notes had nothing to do with seniority placement; (2) all Petitioners were hired by Delta; and (3) the seniority placement itself actually favored older airmen over younger airmen within the respective groups of pilots (Captains and First Officers) and flight engineers.

The district court granted Delta's motion for summary judgment dismissing Petitioners' age discrimination claims. *Adams v. Delta Air Lines, Inc.*, 1997 WL 620823 (S.D.N.Y. Oct. 8, 1997). It is not true, as Petitioners repeatedly assert, that the district court dismissed their age discrimination claims "notwithstanding Petitioners' direct evidence of age-based discriminatory animus" merely because they could not "establish any adverse age-related effect" resulting from the integration methodology. Pet. 10, 11. Although the district court criticized Petitioners for failing to present any evidence

to support their assertion that they had been harmed based on where they had been placed on the Delta pilots' seniority list, the district court ultimately dismissed their claims because they could not show any connection or link between Captain Alger's alleged "age bias" and any adverse action against them on the basis of their ages. *See, e.g.*, *Adams*, 1997 WL 620823, at *4 ("What [Petitioners] fail to show, however, is a connection between the integration methodology adopted by Captain Alger (crediting [Petitioners] with the inference that Captain Alger unilaterally changed the [supplemental collective bargaining agreement]) and age-based bias."); *id.* at *4 n.9 ("[Petitioners] have failed to articulate any theory by which the integration advances a discriminatory motive. The mere fact that Capt. Alger was biased cannot, without more, defeat this properly supported summary judgment motion.").

C. The Second Circuit's Decision

Petitioners appealed the district court's dismissal of their age discrimination claims to the Court of Appeals for the Second Circuit. In an unpublished opinion filed on February 19, 1999, a panel of the Second Circuit unanimously affirmed the district court's grant of summary judgment dismissing Petitioners' age discrimination claims. 175 F.3d 1007 (2d Cir. 1999) (*per curiam*); Petitioners' Appendix, 3-4. The Second Circuit did not hold, as Petitioners mistakenly assert, that "direct evidence of discriminatory animus on the part of a primary decision-maker" is "insufficient to raise an inference of discriminatory motive." Pet. 12. The Second Circuit also denied Petitioners' motion for rehearing and suggestion for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

A. The Second Circuit's Decision Was Correct.

The ADEA makes it unlawful for an employer to discriminate against an individual "with respect to his compensation, terms, conditions, or privileges of employment[ ] because of such individual's age." 29 U.S.C. § 623(a)(1). Age discrimination laws were designed to prevent discrimination on the basis of stereotypes about age. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (the ADEA is designed to combat discrimination against older workers "on the basis of inaccurate and stigmatizing stereotypes" — *i.e.*, that "productivity and competence decline with old age."). Age discrimination laws, however, do not require an employer to give older employees preferential treatment. *See, e.g.*, *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982) ("The ADEA does not require an employer to accord special treatment to employees over forty years of age."), *cert. denied*, 459 U.S. 1103 (1983).

Each of the 71 plaintiffs alleged that Delta discriminated against him on the basis of his age when it offered him employment as a B-727 Second Officer with a position on the Delta pilots' seniority list among existing Delta Second Officers in the bottom portion of the Delta pilots' seniority list. While not challenging the location of the slots that were created for the Pan Am pilots and flight engineers on the Delta pilots' seniority list, Petitioners complain about Delta's failure to re-order Pan Am's separate pilot and flight engineer seniority lists into one list, arguing that if that had been done some of them would have filled higher slots occupied by Pan Am pilots.

1. The District Court Correctly Dismissed Petitioners' Age Discrimination Claims Under the *McDonnell Douglas* Burden Shifting Formula.

The district court correctly dismissed Petitioners' age discrimination claims when analyzed under the *McDonnell Douglas*[4] burden shifting framework, which was the only approach argued by the Petitioners in the district court. As an initial matter, Petitioners failed to establish a *prima facie* case of age discrimination based on the order in which the Pan Am cockpit personnel were placed into the slots created for them on the Delta pilots' seniority list. To make out a *prima facie* case, as the district court correctly stated, Petitioners were required to show, among other things, that they suffered an "adverse employment action," and that the action occurred "under circumstances giving rise to an inference of [age] discrimination." *Adams*, 1997 WL 620823, at *3 (citing *Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2d Cir. 1994)). This Court has emphasized that a "*prima facie* case [under the ADEA] requires '*evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion. . . .*' " *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996) (emphasis in opinion) (quoting *Teamsters v. United States*, 431 U.S. 324, 358 (1977)). Petitioners have not and cannot come forward with evidence to create such an inference.

Petitioners claim that Delta discriminated against them on the basis of their ages by agreeing with the existing Delta pilots, through ALPA, to use the Pan Am flight engineers'

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4. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

seniority list to fill the slots created for the Pan Am flight engineers on the Delta pilots' seniority list. Petitioners, however, cannot show that the use of the two Pan Am seniority lists to fill the slots for the respective cockpit positions "giv[es] rise to an inference of discrimination." It is undisputed that use of the two Pan Am seniority lists within the relevant groups (pilots and flight engineers) ensured that the most favorable treatment generally went to the oldest members of each group.

Petitioners' argument, then, is that by using the separate Pan Am seniority lists for pilots and flight engineers, the agreement negotiated between Delta and ALPA treated older Pan Am *pilots* more favorably than it treated older Pan Am *flight engineers*. Even if the agreement treated older Pan Am pilots more favorably than it treated older Pan Am flight engineers, that fails to give rise to an inference of "age discrimination," since it is undisputed that the two groups had a roughly equivalent proportion of members throughout the age spectrum. Indeed, the 690 Pan Am pilots hired by Delta were, on average, *older* than the 84 Pan Am flight engineers hired by Delta. The difference in treatment between Pan Am pilots and Pan Am flight engineers was obviously not *age*, since both groups had roughly equivalent proportions of members throughout the age spectrum, but *position*.

As the district court correctly observed, Petitioners "have failed to show how that [the seniority placement] methodology was age-biased (as opposed to 'Flight Engineer' biased)." *Adams*, 1997 WL 620823, at *2 n.7. The Second Circuit reached a similar conclusion in *Bovers v. Flying Tiger Line, Inc.*, 979 F.2d 291, 297-98 (2d Cir. 1992), where it affirmed a summary judgment dismissing an ADEA

challenge to the integration of two air cargo companies' seniority lists because "the motivating distinction" between the treatment of cockpit personnel on the integrated list "was the airline of origin," not age.

Petitioners complain that the final version of the supplemental collective bargaining agreement, which set forth the agreed upon seniority integration methodology, "radically altered" (Pet. 5) earlier unsigned, draft versions of the collective bargaining agreement, and that Delta's Captain Alger "had planned to and did unilaterally change" the seniority integration methodology. *Id.* at 6. This is not true. First, the APA between Pan Am and Delta obligated Pan Am to provide Delta with the seniority order of the cockpit personnel to be hired by Delta. APA, ¶¶ 5.9(a),(h)(i). Delta and ALPA recognized this fact by including in *every* draft and the final version of the supplemental collective bargaining agreement that Delta would fill the slots created for the Pan Am cockpit crewmembers on the Delta list "in the seniority order as defined by Pan American World Airways, Inc., and as conveyed to [Delta]." Earlier drafts included a default provision that stated *if* Pan Am failed to provide any seniority rankings and Delta was left without any way to rank the Pan Am cockpit personnel, Delta would use their dates of birth.[5] The default provision was removed

5. Re-ordering the Pan Am cockpit personnel by date of birth would have had the effect of completely scrambling the relative seniority rankings of both pilots and flight engineers, since neither the Pan Am pilots' seniority list nor the Pan Am flight engineers' seniority list was based on a date of birth ordering and both had been constructed by an arbitration award (which is described in detail in *Cook v. Pan American World Airways, Inc.*, 647 F. Supp. 816, 818-21 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 1030 (2d Cir. 1987)), following the merger of Pan Am and National Airlines, Inc. in 1980.

during the drafting process after it became unnecessary, *i.e.*, after Pan Am provided its seniority rankings in the form of two seniority lists, one for pilots and one for flight engineers.

Second, neither Delta nor Captain Alger had the right or the ability to impose "unilaterally" (Pet. 6) a seniority integration methodology on the Delta pilots' union, ALPA. The seniority integration methodology contained in the supplemental collective bargaining agreement between Delta and ALPA was the product of the collective bargaining process. Significantly, although ALPA also was named as a defendant, Petitioners have asserted no substantive claim against it.[6] Petitioners' evidence of alleged personal "age bias" on the part of Captain Alger, even if taken as true, is thus completely irrelevant. The fatal defect in Petitioners' age discrimination claims, the district court correctly held, was Petitioners' inability to show any connection or link between their evidence of alleged "age bias" and any adverse action taken against them on the basis of their ages. *Adams*, 1997 WL 620823, at *4.

Even assuming, *arguendo*, that each Petitioner had established a *prima facie* case of intentional age discrimination, such proof merely would have created a rebuttable presumption of discrimination that Delta could dispel by articulating a legitimate, non-discriminatory reason for its actions. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. at 510-11. Delta easily met this burden by presenting

---

6. The district court ordered that ALPA be joined as a defendant, pursuant to Fed. R. Civ. P. 19(a), because "ALPA has an interest in the validity and construction of the collective bargaining agreements which it negotiated and to which it is a signatory," and because "ALPA's presence may be necessary to protect the interests of its members who are not parties to this action."

undisputed evidence demonstrating that it filled the slots created for the Pan Am cockpit personnel on the Delta pilots' seniority list using the two Pan Am seniority lists because:

(1) Delta had agreed in the APA with Pan Am (APA, ¶¶ 5.9(a),(h)(i)), as well as in every draft and the final version of the supplemental collective bargaining agreement with its existing pilots, to follow Pan Am's determination of seniority.

(2) Early drafts of the supplemental collective bargaining agreement provided that if Pan Am failed to provide any seniority rankings to Delta, then Delta and ALPA would fill the slots on the Delta pilots' seniority list using the dates of birth of the Pan Am cockpit personnel. Pan Am, however, provided two seniority lists, thus making the "date of birth" default provision in the unsigned draft of the supplemental collective bargaining agreement inapplicable.

(3) A majority of the Pan Am flight engineers hired by Delta were "professional flight engineers" who held no position on the Pam Am pilots' seniority list. Thus, the only existing Pan Am seniority list that could be used to fill the flight engineer slots was the Pan Am flight engineers' seniority list.

(4) Delta's and ALPA's use of the Pan Am flight engineers' seniority list to fill flight engineers slots placed Petitioners, who were hired as B-727 Second Officers (flight engineers), among Delta pilots holding the same cockpit position.

(5) Combining the Pan Am pilot and flight engineer seniority lists and using such a new combined list to fill the slots would have required Delta to do what Pan Am and its two unions could not or would not do — reach an agreement on how to merge the two separate seniority lists — and would have reduced the seniority positions of similarly aged Pan Am Captains and First Officers relative to Delta Captains and First Officers.

Petitioners expressly conceded in the district court that Delta had articulated legitimate, non-discriminatory reasons for why it used the two Pan Am seniority lists to fill the slots. *Adams*, 1997 WL 620823, at *3. Delta's legitimate, non-discriminatory explanation for why it used the two Pan Am seniority lists destroyed any inference of discrimination that would have arisen if Petitioners had been able to establish a *prima facie* case. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

Once a defendant articulates a legitimate, non-discriminatory reason for its action, the plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 450 U.S. at 253. The Court explained in *Hicks* that the articulated "reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Hicks*, 509 U.S. at 515 (emphasis in opinion) (quoting *Burdine*, 450 U.S. at 253).

With regard to Petitioners' first burden, there is no evidence that any reason Delta has articulated for the use of the two Pan Am seniority lists is false. Petitioners made no

effort to dispute Delta's evidence that the slots created for the Pan Am cockpit personnel on the Delta pilots' seniority list were filled as they were for the reasons stated above.

With regard to Petitioners' second burden in proving pretext, there is no evidence that Delta was actually motivated to discriminate against Petitioners because of their ages by agreeing with ALPA to use the Pan Am flight engineers' seniority list to fill the flight engineer slots on the Delta pilots' seniority list. The APA required Delta to defer to Pan Am's determination of seniority. Moreover, there would be no benefit to Delta in the manner in which Petitioners were placed on the pilots' seniority list. Delta gained nothing by the placement of Pan Am flight engineers above or below Pan Am pilots. Bidding seniority only matters to those bid against. As far as Delta was concerned, the order in which the Pan Am cockpit personnel were placed on the Delta pilots' seniority list was a "zero sum" process.

Petitioners' argument, reduced to its essence, is that Delta engaged in unlawful age discrimination by not *ignoring* all seniority rankings at Pan Am. Petitioners claim that Delta should have unilaterally reordered the Pan Am pilots and flight engineers by date of birth, and then used that new order to fill all slots on the Delta pilots' seniority list, despite the wishes and protestations of the Pan Am pilots or ALPA.

For Delta to have attempted to create and use a combined Pan Am seniority list, where Pan Am, ALPA, and the FEIA had been unable to do so, would have disadvantaged similarly aged Pan Am Captains and First Officers and would have caused turmoil. If Delta had created and imposed a combined Pan Am seniority list based on date of birth or date of hire at Pan Am or its predecessors, some Petitioners would have

been placed higher on the Delta pilots' seniority list, and above or among some of the Pan Am pilots. This would have resulted in some of the oldest and most senior Pan Am flight engineers, who could not serve as pilots, being slotted among Delta's existing Captains and First Officers. As a consequence, some Pan Am pilots hired as Captains and First Officers would have been bumped down the Delta seniority list, reducing their ability to compete against original Delta pilots in bidding for the cockpit positions they were hired into once the three-year bidding restrictions were removed.[7]

The consequences of Petitioners' claims on the other Pan Am cockpit personnel confirm that this case involves nothing more than an internal struggle for seniority slots among former Pan Am pilots and flight engineers — a dispute that pre-dates any involvement by Delta. Those former Pan Am pilots whose seniority positions were targeted by Petitioners would no doubt claim that they should have higher slots than Petitioners because they were in a recognized higher category — *i.e.*, they were hired as pilots (Captains and First Officers) and Petitioners were not. Regardless of

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7. If Delta had placed the Petitioners in this case higher on the seniority list, as they now demand, it is likely that those Pan Am pilots whom they displaced would have attempted to assert their own claims against Delta for violating the supplemental collective bargaining agreement and disregarding the two Pan Am seniority lists. While those claims might have been as equally lacking in merit as Petitioners' claims here, the very nature of employee seniority rights frequently generates litigation. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) ("Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement [on seniority] affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.").

the respective merits of the squabble, it has nothing to do with Delta or age discrimination. Petitioners' real motive in filing this lawsuit was not to complain about alleged "age discrimination," but to try to use such a claim to achieve at Delta what their union, the FEIA, had been unable to do in negotiations with ALPA and Pan Am — merge the separate pilot and flight engineer seniority lists to their advantage.[8]

Because there is no age discrimination in this case, Petitioners' alleged evidence of "age bias" is irrelevant. Thus, the district court correctly dismissed Petitioners' age discrimination claims, and the Second Circuit correctly affirmed.

2. Petitioners Have No Direct Evidence of Age Discrimination and This Not a "Mixed Motive" Case Under *Price Waterhouse.*

In their Petition, Petitioners repeatedly argue that they presented "direct evidence" of age discrimination. *See, e.g.*,

8. Petitioners' use of an "age discrimination" theory is not a new tactic. Ironically, it has been tried before by Pan Am pilots, unsuccessfully, in *Cook v. Pan American World Airways, Inc.*, 647 F. Supp. 816 (S.D.N.Y. 1986), *aff'd per curiam*, 817 F.2d 1030 (2d Cir. 1987). In *Cook*, certain Pan Am pilots mounted a challenge under the ADEA to the Pan Am integrated seniority lists for pilots and flight engineers at Pan Am after Pan Am's merger with National Airlines, Inc. in 1980. As a result of that merger, all cockpit crewmembers, pilots and flight engineers, became Pan Am cockpit crewmembers. The plaintiffs claimed in *Cook*, like the Petitioners in this case, that they were victims of "age discrimination" because they were not ranked as high as they would have liked on the integrated seniority lists for pilots and flight engineers at Pan Am. The district court in *Cook* granted the defendants' motion for summary judgment and dismissed the plaintiffs' age discrimination claims, and the Second Circuit affirmed.

Pet. i, 6, 10, 11, 12, 16, 17. Petitioners' use of the term "direct evidence" is apparently meant to refer to the *Price Waterhouse*[9] mixed-motive analysis. The district court did not rule on whether Petitioners had made out a case of age discrimination under a *Price Waterhouse* mixed-motive approach because Petitioners never raised this argument in the district court. Petitioners have waived this argument, and they may not raise it for the first time on appeal. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").

Even if Petitioners had properly preserved this issue for appeal, the district court's summary judgment order was still correct. Since Petitioners could not come forward with enough evidence to defeat Delta's motion under the *McDonnell Douglas* approach, they certainly did not come forward with enough evidence to shift the burden of proof to Delta under the more onerous *Price Waterhouse* mixed-motive approach.

In *Price Waterhouse*, this Court dealt with a mixed-motivation case, in which the plaintiff offered evidence, credited by the district court as factfinder, that a forbidden reason played a motivating role in the adverse employment decision. 490 U.S. at 235 (plurality opinion). The defendant presented evidence, also credited by the district court, that it also had legitimate concerns about the plaintiff's interpersonal skills. A majority of this Court concluded that if the plaintiff in a Title VII suit can establish that a prohibited discriminatory factor played a "motivating part" in the challenged employment decision, the defendant, in order to

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9. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

avoid liability, has the burden of proving "by a preponderance of the evidence that it would have made the same decision" even if it had not taken the discriminatory factor into account. *Id.* at 258 (plurality opinion); *see id.* at 259-60 (White, J., concurring); *id.* at 261 (O'Connor, J., concurring). As the Second Circuit has made clear, "*Price Waterhouse* is thus a defense." *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 181 (2d Cir. 1992).

Here, Petitioners presented no "direct evidence"[10] of age discrimination. Captain Alger had neither the right nor the ability to impose any seniority integration methodology on the Delta pilots or their union. Moreover, the Asset Purchase Agreement between Delta and Pan Am, and every draft of the supplemental collective bargaining agreement between Delta and ALPA as well as the final, signed agreement, provided that Delta was obligated to follow the seniority rankings as determined by Pan Am and as conveyed to Delta. The only relevant conduct or action was by Pan Am in furnishing Delta with separate seniority rankings for pilots and flight engineers. Even if Captain Alger were biased against older airmen, and he is not[11], there simply was no

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10. Direct evidence of discrimination is evidence which, if believed, would prove without inference or presumption that the affected employees were discriminated against. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.), *cert. denied*, 506 U.S. 826 (1992); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990); *Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir.), *cert. denied*, 498 U.S. 848 (1990).

11. Although irrelevant for the reasons stated in the text, the comments in Captain Alger's notes do not reflect age bias. Captain Alger took these notes during a meeting with his counterpart at Pan

(Cont'd)

decision that he made, or action that he took, that even arguably could be called "age discrimination."

Thus, neither the district court nor the Second Circuit held that Petitioners had presented "direct evidence" of age discrimination. Instead, the district court held that Petitioners' inability to show any connection or link between Captain Alger's alleged "age bias" and any adverse action taken against them on the basis of their ages doomed their "age discrimination" claims. *Adams*, 1997 WL 620823, at *4. The *Price Waterhouse* "mixed motive" approach, even if properly preserved for appeal, does not apply. As the

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(Cont'd)
Am, Captain Daniel J. Affourtit, Jr., as part of Delta's initial fact-finding investigation of whether it should pursue a transaction with Pan Am. There is no dispute that during this meeting Captain Affourtit did the talking and Captain Alger merely listened and took notes. Captain Alger testified, "I'm taking notes . . . from listening to my counterpart." Captain Affourtit similarly testified that during this meeting he told Captain Alger "about Pan Am and its pilots and its facilities" and Captain Alger "took notes." Notwithstanding Captain Alger's notes, Delta agreed to pursue the transaction, agreed to hire qualified Pan Am flight engineers "in seniority order" (thus assuring that the most senior Pan Am flight engineers would be hired), and agreed with ALPA to place the Pan Am flight engineers on the Delta pilots' seniority list according to their flight engineer seniority at Pan Am (again assuring that the most senior flight engineers would receive the most favorable treatment). Moreover, the relative ranking of the Pan Am pilots and flight engineers on the Delta pilots' seniority list was an internal Pan Am issue rather than a concern of Captain Alger or Delta. Thus, the district court did not need to reach the issue of Captain Alger's alleged "age bias" to grant Delta's motion for summary judgment, nor did the Second Circuit need to reach this issue to affirm.

Second Circuit stated in *Ostrowski*, "[t]he *Price Waterhouse* issue does not arise for the trier of fact until the plaintiff has carried the burden of persuading the trier that the forbidden animus was a motivating factor in the employment decision. . . ." 968 F.2d at 181; *see also Raskin v. Wyatt Co.*, 125 F.3d 55, 60 (2d Cir. 1997) ("To warrant a *Price Waterhouse* burden shift, the plaintiff must initially show that an impermissible criterion was in fact a 'motivating' or 'substantial' factor in the employment decision.") (quotations omitted). No such evidence was presented.

Petitioners' problem under the *McDonnell Douglas* approach was that they had no evidence that the conduct complained of (Delta's agreement to use the Pan Am flight engineers' seniority list to fill flight engineer slots) was age-based. Having failed in this effort, they certainly have not come forward with sufficient evidence to shift the burden of proof to Delta under the *Price Waterhouse* "mixed motive" approach.

B. No Issue Worthy of the Court's Certiorari Review is Presented by the Petition.

Petitioners argue that the Second Circuit's unpublished *per curiam* opinion in this case "is in direct conflict with the decisions of several United States Courts of Appeals." Pet. 12. The predicate for this argument is Petitioners' assertion that the Second Circuit "ruled that Petitioners' direct evidence of discriminatory animus on the part of a primary decision-maker at Delta was insufficient to raise an inference of discriminatory motive." *Id.*

As demonstrated above, the Second Circuit neither held nor stated that "direct evidence of discriminatory animus on

the part of a primary decision-maker" for a defendant employer is "insufficient to raise an inference of discriminatory motive." As a result, the Second Circuit's opinion is not in conflict with the decisions of other United States Circuits Courts of Appeals discussed in the Petition (13-16).

Petitioners argue that if the Second Circuit's decision is allowed to stand, "the civil rights laws enacted for the protection of workers in this country will be effectively nullified." Pet. 17-18. This is sheer hyperbole. Petitioners are merely disappointed with the outcome of this case and have attempted to concoct a circuit conflict where none exists by misstating the Second Circuit's holding.

No novel, unique, or disputed issue of law is presented by the Petition. At most, Petitioners are merely complaining about the Second Circuit's analysis of the particular facts involved in this case. This Court has stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.). Indeed, this Court has indicated that it is even less likely to review a case where, as here, the factual analysis and conclusion of the district court has received the concurrence of the court of appeals. In that situation, the Court has often stated that it is not "a court for correction of errors in fact finding," and that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *accord Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Here,

the district court and the Second Circuit have both concluded that Petitioners have failed to come forward with evidence that Delta discriminated against them because of their ages. Such "a very obvious and exceptional showing of error" is not present in this case.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — ASSET PURCHASE AGREEMENT DATED JULY 27, 1991

ASSET PURCHASE AGREEMENT

AMONG

PAN AM CORPORATION,

PAN AMERICAN WORLD AIRWAYS, INC.

PAN AM SHUTTLE, INC.

AND

DELTA AIR LINES, INC.

JULY 27, 1991

Appendix A

ASSET PURCHASE AGREEMENT

ASSET PURCHASE AGREEMENT dated July 27, 1991 among Pan Am Corporation, a Delaware corporation ("Parent"), Pan American World Airways, Inc., an indirect wholly-owned subsidiary of Parent and a New York corporation ("Airways"), Pan Am Shuttle Inc., a wholly-owned subsidiary of Parent and a Delaware corporation ("Shuttle"), debtors-in-possession (Shuttle and Airways being referred to herein collectively as "Sellers" and each individually as a "Seller"; where appropriate, the terms Seller or Sellers shall refer only to the applicable Seller), and Delta Air Lines, Inc., a Delaware corporation ("Buyer").

* * *

2.1.(b) *Aircraft.* Subject to obtaining the consent of the lessors, sublessors or mortgagees with respect thereto, up to 9 Boeing 727 aircraft listed on *Asset Schedule* 2.1(b)(i) (*provided* that if for any reason (including the failure to obtain any consent of a lessor, sublessor or mortgagee), Sellers are unable to deliver any of such aircraft designated by Buyer at the Closing free and clear of all Liens other than Permitted Liens, Buyer may at its option either substitute for such aircraft any other aircraft listed on *Asset Schedule* 2.1(b)(ii) or eliminate without replacement such aircraft from the Shuttle Aircraft to be delivered at Closing; and *provided, further*, that in the event Buyer is unable to obtain the five B727 aircraft

owned by Continental Airlines, Inc. that were formerly used in the Shuttle Service, Buyer may select up to 5 additional Aircraft listed on *Asset Schedule* 2.1(b)(ii) if the transfer of such additional aircraft (x) is not materially inconsistent with Sellers' ability to operate after the Closing, as presently contemplated and advised to Buyer in writing not later than August 15, 1991, and (y) does not materially delay the Closing with respect to the Shuttle Assets) fully equipped for revenue use and Federal Aviation Regulations Part 121 operations, in airworthy condition (except to the extent any such aircraft are undergoing routine maintenance pursuant to Sellers' maintenance program) and, subject to Section 5.21, in Sellers' all economy shuttle configuration (the "Shuttle Aircraft"), including the documents specified in *Asset Schedule* 2.1(b)(iii);

* * *

2.2.(b) *Aircraft.* Subject to obtaining the consent of the lessors, sublessors or mortgagees with respect thereto, the 21 Airbus A310 aircraft identified on *Asset Schedule* 2.2(b)(i) and up to 10 Boeing 727 aircraft selected by Buyer from the aircraft listed on *Asset Schedule* 2.2(b)(ii) and *Asset Schedule* 2.2(b)(iii) (*provided* that (i) the number of such Boeing 727 aircraft to be acquired by Buyer and the identification by tail number of such Boeing 727 aircraft shall be made by Buyer

no later than September 15, 1991, and (ii) if for any reason, (including the failure to obtain any consent of a lessor, sublessor or mortgagee), Sellers are unable to deliver their interest in any of the Boeing 727 aircraft designated by Buyer at the Closing free and clear of all Liens other than Permitted Liens, Buyers may at its option either substitute for such Boeing 727 aircraft any other Boeing 727 aircraft listed on *Asset Schedule* 2.2(b)(ii) and *Asset Schedule* 2.2(b)(iii) or eliminate without replacement such aircraft from the Airways Aircraft to be delivered at Closing), fully equipped for revenue use and Federal Aviation Regulations Part 121 operations and in airworthy condition (except to the extent any such aircraft are undergoing routine maintenance pursuant to Sellers' maintenance program) (the "Airways Aircraft"), whether owned, leased or subleased, including all the documents specified in *Asset Schedule* 2.1(b)(iii);

* * *

5.9. *Employees*. (a) As soon as practicable and in any event within seven days after the date hereof, Sellers shall provide to Buyer a list of all employees in order of seniority and by location and classification which list shall include the job title, salary, status (*i.e.*, whether the employee is active or on furlough or leave of absence or other status), employee number and date of hire of such persons. Such list shall be accurate to the best of

Appendix A

Sellers' knowledge and Seller shall supply on a weekly basis all changes with respect to the information set out therein. Sellers shall grant time off during working hours to any employee designated by Buyer to be interviewed, at times reasonably designated by Buyer, for possible employment.

* * *

5.9.(c)(i) Except where not practicable because of the constraints of foreign law and subject to (x) subsections 5.9(c)(ii) hereof and, with respect to pilots, 5.9(h) hereof and (y) to reaching the agreement with Buyer's pilots, as represented by ALPA, described in Section 6.11 hereof,

* * *

(B) By no later than August 15, 1991 Buyer shall advise Sellers in writing of the material terms and conditions upon which offers of employment to the selected Sellers' employees will be made; *provided* that Buyer may be unable to finalize all of the terms of seniority integration until after the Transferred Employees have been identified, in which case Buyer will provide a description of Buyer's objectives and intentions with respect

to seniority integration, as well as, a description of the seniority integration methodologies that Buyer is likely to use.

* * *

5.9.(h)(i) Buyer will offer employment to at least seven hundred (700) of Sellers' pilots, who must be fully trained and currently qualified in the Boeing 727 or Airbus A-310 categories (*i.e.*, Airbus A-310 Captain, Boeing 727 Captain, Airbus A-310 First Officer, Boeing 727 First Officer, Boeing 727 Second Officer) as of November 1, 1991 (subject to subsections 5.9(h)(ii) and (v) hereof), or such other date as may be agreed upon in writing by Buyer and Sellers, and who must meet all of Buyer's standards and requirements for pilots, including without limitation medical requirements, in order to be eligible for consideration by Buyer hereunder. Subject to subsections 5.9(h)(iii) and (vii), Sellers' pilots who meet such requirements will be offered employment with Buyer in seniority order by category. Except as provided in subsection 5.9(h)(ii), such offers shall be for employment effective upon the Closing. Buyer shall determine in its sole discretion the number of Sellers' pilots in each such category to whom Buyer will offer employment.

* * *

(vi) Buyer will meet with Sellers' pilots, as represented by ALPA and FEIA, at such times and locations as are determined by Buyer before entering into the agreement described in Section 6.11 hereof, in order to receive input and to help Buyer understand the issues considered by Sellers' pilots, as represented by ALPA and FEIA, to be significant with respect to such agreement, including the methodology for seniority integration. Buyer shall not be required to obtain the consent or agreement of Sellers' pilots, as represented by ALPA and FEIA, or of Sellers, as a condition to entering into the agreement described in Section 6.11 or as a condition to taking any other action pursuant to or in connection with this Agreement. It is expressly understood that this provision shall not create any contractual or other rights in favor of Sellers' pilots, as represented by ALPA and FEIA or otherwise, or any individual pilot, it being the sole purpose of this provision to allow Sellers' pilots, as represented by ALPA and FEIA, to present their views to Buyer.

* * *

6.11. *Labor Agreements*. Buyer shall have reached agreement with the Buyer's pilots, as represented by ALPA, concerning the terms and conditions upon which the offers of employment referred to in Section 5.9 hereof will be made to Sellers' pilots, including without limitation the methodology for determining seniority integration.

* * *

Appendix A

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be executed as of the date first above written.

DELTA AIR LINES, INC.

BY: /s/ Ronald W. Allen
Name: Ronald W. Allen
Title: Chairman and Chief Executive Officer

ATTEST: _____
Name:

PAN AMERICAN WORLD AIRWAYS, INC.

BY: /s/ T. G. Plaskett
Name: Thomas G. Plaskett
Title: Chairman and Chief Executive Officer

ATTEST: _____
Name:

Appendix A

PAN AM SHUTTLE, INC.

BY: /s/ T. G. Plaskett
Name: Thomas G. Plaskett
Title: Chairman and Chief
Executive Officer

ATTEST: _____
Name:

PAN AM CORPORATION

BY: /s/ T.G. Plaskett
Name: Thomas G. Plaskett
Title: Chairman and Chief
Executive Officer

ATTEST: _____
Name:

(3)

Supreme Court, U.S.
FILED
SEP 7 1999
OFFICE OF THE CLERK

No. 99-188

In The

Supreme Court of the United States

ERICH H. ADAMS, et al.,

Petitioners,

v.

DELTA AIR LINES, INC. and
AIR LINE PILOTS ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

ARGUMENT

Delta Ignores the Question Presented for the Court's Consideration

Presumably displeased with Petitioners' framing of the Question Presented for Review in their petition, Delta posits a different inquiry – one which bears no relation to the Second Circuit's disposition of this case. Petitioners respectfully submit that their Question Presented is the proper one, as it squarely addresses the conflict the Second Circuit's opinion herein creates with other federal Circuit Courts of Appeals. For this reason, Delta's attempt to change the focus of this petition (and thereby poison the well against Petitioners), should be disregarded.

As evident from the opinion itself, the Second Circuit's decision in this case was simple and straightforward:

> Because we agree with the district court that plaintiffs failed to offer proof from which a reasonable fact finder could infer that defendant had a discriminatory motive in implementing its integration methodology, . . . we affirm the grant of summary judgment.

Adams v. Delta, 175 F.3d 1007 (2d Cir. 1999) (unpublished opinion); Appendix to Petition ("App."), 4.[1] The Second

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[1] Curiously, Delta repeatedly refers to the Second Circuit's opinion as "unpublished," Brief in Opposition, pp. 2, 11, 25, apparently seeking to downplay its significance. While the opinion may not have been published, it is no less binding or

Circuit's opinion begs the question: what ("inadequate") proof did Petitioners provide? As discussed hereafter, Petitioners offered overwhelming proof – deemed credible by the district court – that the primary decision-maker in the adverse employment action at issue in this case harbored impermissible age-based bias. The Second Circuit found this proof insufficient to avoid summary judgment. Thus, the question presented in the petition cogently and squarely captures the relevant issues in this case, and does not – unlike Delta's proffered question – deviate from the explicit holding of the Second Circuit, nor raise issues collateral to the Second Circuit's treatment of this appeal.

Delta Completely Disregards the District Court's Findings

Not content with merely ignoring the actual holding of the Second Circuit, Delta spends the bulk of its Brief in Opposition re-arguing the relevant findings made by the district court regarding Captain Alger and his alteration of the Supplemental CBA. In so doing, Delta comes to the extraordinary conclusions that Petitioners offered no "direct evidence" of discrimination by Alger in this case, and that the Supplemental CBA (and the integration methodology therein) was not altered by anyone at Delta, including Alger. Delta's positions on these respective

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final on the parties, and it cannot be disputed that the Second Circuit's opinion herein has dire consequences for Petitioners – especially because it was wrongly decided.

issues cannot withstand scrutiny, especially when the district court's opinion is considered.

Direct Evidence of Alger's Age-Based Bias

In its brief, Delta posits that Petitioners have not (and presumably cannot) come forth with any direct evidence of discrimination because Captain Alger is not age-biased. Brief in Opposition, pp. 23-24. The district court found to the contrary, however, as outlined in the petition, p. 16; App. 14-16.

> Plaintiff's argument that the integration methodology was motivated by discriminatory motive focuses on the derogatory comments contained in Capt. Alger's notes and deposition transcript and Delta's alleged history of age discrimination. Such comments certainly reflect a bias toward older pilots, and the deposition testimony in particular evinces a bias based on the sorts of age-based stereotypes that the ADEA was meant to combat.

(App. 14).[2]

The district court went on to refer to Alger as "he of impermissible age-based bias." (*Id.*).

Notwithstanding the district court's explicit findings to the contrary, *supra*, Delta again seeks to assert that

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[2] In light of this finding by the district court, Delta's citation to *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), and the discussion therein regarding the "inaccurate and stigmatizing stereotypes" which run counter to the ADEA's principles, (Brief in Opposition, p. 12), is particularly interesting.

Alger's notes – which contain the relevant derogatory age-based comments – were not statements by Alger, but were merely notations reflecting statements by Captain Affourtit at Pan Am. Brief in Opposition, pp. 23-24, note 11. This claim was previously exposed as unworthy of belief by Affourtit, as referenced in the petition, p. 8, notes 7 and 8. Nonetheless, to the extent that there is a **genuine** factual dispute about the "author" of the statements reflected in those notes, all reasonable inferences must be drawn in favor of Petitioners' view of this evidence, as this is a summary judgment case. Consequently, the derogatory comments were the words of Alger.

The above record citations leave no doubt that Petitioners produced evidence that Alger harbored discriminatory attitudes toward older cockpit personnel, and that the district court found this evidence credible. This, therefore, is the factual posture in which the Second Circuit reviewed this case – with credible direct evidence that Delta (Alger) had impermissible age-based animus.

Proof That the Integration Methodology Was Altered By Delta

Incredibly, despite all that has transpired and been decided previously in this case, Delta now asserts that there was nothing surprising or problematic about the methodology with which it integrated the Pan Am personnel, including Petitioners. This is patently false.

Perhaps trading on the Court's lack of familiarity with the underlying facts in this case, Delta disclaims any wrong-doing here by informing that it integrated Pan Am pilots by using their seniority list, and the Pan Am flight

engineers (Second Officers) using their seniority list – implying that this was completely appropriate in this case. Brief in Opposition, pp. 1-2, 8-9, 13-14. The problem with the integration methodology employed by Delta, however, is that **it was contrary to the integration methodology provided for in all prior drafts of the agreement between the parties**. As found by the district court, this unilateral change was also made without the required notice:

> In initial drafts of the Supplemental CBA, which were shown to the Pan Am pilots pursuant to the APA, Pan Am First and Second Officers were to be ranked against each other, **collectively**, and then integrated into the Delta list behind Pan Am Captains. *See* Draft Supplemental CBA § 20(F)(2). Moreover, the initial drafts provided that if Pan Am failed to provide **a list** of First and Second Officers by seniority rank, then the pilots' birth-date would be used to establish rank among them. *See id.* § 20(F)(3).
>
> The final version of the Supplemental CBA, however, did not contain the birth-date fall-back provision, and provided that Second Officers (i.e., Flight Engineers) be ranked according to the Pan Am Flight Engineers' union (FEIA) seniority list – i.e., Second Officers were to be ranked separate from First Officers. Plaintiffs allege (and defendant does not dispute) that, in violation of the APA, **this last minute change to the Supplemental CBA** was never shown to Pan Am pilots prior to its execution on August 30, 1991.

* * *

> Plaintiffs also make much of the **last-minute change to the Supplemental CBA** that resulted in Flight Engineers being integrated according to the separate FEIA list provided by Pan Am, as opposed to being ranked by birth-date **with** First Officers.

(App. 8-9, 15) (emphasis supplied).

The above quoted material lays waste to Delta's continuing mantra that it acted appropriately in employing the two-list integration methodology. The indisputable facts here are that the parties agreed that Pan Am would attempt to provide Delta with a unified seniority list which merged the existing First and Second Officer seniority lists. Barring success in so doing, the parties agreed that the unified list would be created using the dates-of-birth (rather than seniority) of both the First and Second Officers. Draft Supplemental CBA §§ 20(F)(2) and (F)(3). Despite these prior understandings between the parties, Delta thereafter unilaterally changed the integration methodology to one which (improperly) had catastrophic consequences for Petitioners. This Court, like the district court, should disregard Delta's claim that it integrated Petitioners in an appropriate (non-controversial) manner.

Proof That It Was Alger Who Unilaterally Altered the Integration Methodology

Delta next posits that direct evidence is lacking because Alger "neither had the right nor the ability to impose any seniority integration methodology" here. Brief in Opposition, pp. 16, 23-24. Delta is wrong again,

as shown in the district court's opinion. Simply put, the district court found, for the purposes of summary judgment, that Alger had unilaterally altered the Supplemental CBA, thereby instituting the integration methodology complained of by Petitioners.

> Plaintiffs also allege that [Alger] advised Pan Am personnel of this methodology three days before the supplemental CBA was executed. Plaintiff's believe this fact, as well as other evidence described below, supports their contention that Capt. Alger unilaterally changed the ranking system. . . . [T]he Court must, on this motion for summary judgment, draw all inferences in favor of plaintiffs.
>
> * * *
>
> This evidence, plaintiffs contend, raises an inference that Captain Alger – he of impermissible age-based bias – was responsible for the change in the Supplemental CBA. Up to this point all is well and good for plaintiffs.

(App. 9, and note 4; 15).

Try as it might, Delta cannot get around this evidence. Moreover, this evidence of Alger's role in the adverse employment action, combined with the proof of his impermissible age-based bias, unquestionably rises to the level of "direct evidence" from which a fact-finder could find that discrimination played at least a motivating role in the decision to change the integration methodology. *Terbovitz v. Fiscal Court of Adair County Kentucky*, 825 F.2d 111, 115 (6th Cir. 1987); *Starceski v. Westinghouse Electric Corp.*, 54 F.3d 1089, 1097 (3rd Cir. 1995); *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997); *Burns v. Gadsen State Community College*, 908 F.2d 1512, 1518 (11th Cir.

1990). This is precisely why the Second Circuit's dismissive treatment of this direct evidence cannot stand, and the petition should be granted.

Delta Fails to Address the Clear Conflict Created by the Second Circuit's Ruling

Based on nothing more than circular reasoning, Delta completely avoids any discussion about the inter-circuit conflict which gives rise to the present petition. Brief in Opposition, pp. 25-26. Delta apparently believes that because the Second Circuit did not specifically spell out its rejection of Petitioners' direct evidence of discrimination, there can be no conflict with cases from the Third, Sixth, Seventh and Eleventh Circuits holding that such evidence necessarily precludes summary judgment. As demonstrated above, however, the Second Circuit unquestionably rejected Petitioners' direct evidence in making its ruling, as this is the only conclusion that can be drawn from the determination that Petitioners' evidence – which included the direct evidence relating to Alger – was insufficient to avoid summary judgment. Thus, the conflict discussed in the petition, pp. 13-17, is manifest.

Petitioners Did Not "Waive" Their Right to a *Price Waterhouse* Consideration

Finally, Delta's assertion that Petitioners somehow "waived" their right to a *Price Waterhouse* analysis, Brief in Opposition, pp. 21-22, is simply wrong. In the *Price Waterhouse* opinion itself, this Court put the onus on the

district court to determine whether an employment discrimination plaintiff can prove his or her case under either a *Price Waterhouse* analysis or a *McDonnell Douglas* analysis:

> Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a "pretext" case or a "mixed-motives" case from the beginning in the district court[.] . . . At some point in the proceedings, of course, **the District Court must decide** whether a particular case involves mixed motives.

Price Waterhouse, 490 U.S. 228, 246 (Brennan, J.) (emphasis supplied).

* * *

> Once all the evidence has been received, **the court should determine** whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it. If the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*.

Price Waterhouse, 490 U.S. 228, 278 (O'Conner, J.) (emphasis supplied).[3]

Thus plaintiffs, like Petitioners here, are under no duty to "opt into" one particular framework, as Delta

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[3] *Accord Radabaugh v. Zip Feed Mills*, 997 F.2d 444, 448 (8th Cir. 1993) ("Whether a case is a pretext case or a mixed-motives case is a question for the court once all the evidence has been received."); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1098 (3d Cir. 1995) (same).

seems to argue, and the above quoted material supports Petitioners' claim before the Second Circuit that the district court erred in failing to properly apply the Court's mandate in this regard.[4] Perhaps this explains Delta's failure to cite to any case applying such a "waiver" concept in cases like the present one.

CONCLUSION

Based on the arguments and authorities set forth above and in the petition, Petitioners respectfully request that the Court accept certiorari jurisdiction in this case pursuant to Rule 10(a) of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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[4] Notably, the Second Circuit did not find that Petitioners waived their right to a *Price Waterhouse* analysis.